(6)

No. 83-1625-CFY
Status: GRANTED

Title: United States, Petitioner
v.
Lyle Gerald Johns, et al.

Docketed:
April 3, 1984

Court: United States Court of Appeals
for the Ninth Circuit

Counsel for petitioner: Solicitor Gereral

Counsel for respondent: Walker,William G., Keller,Peter B., Hirsh,Robert J., Piccarreta,Michael L., Nash III,Walter B., Solicitor General

Entry	Date	Note	Proceedings and Orders
1	Feb 23 1984		Application for extension of time to file petition and order granting same until April 3, 1984 (Rehnquist, February 27, 1984).
2	Apr 3 1984	G	Petition for writ of certiorari filed.
4	May 8 1984		Order extending time to file response to petition until May 29, 1984.
5	May 29 1984		DISTRIBUTED. June 14, 1984
7	May 29 1984	X	Brief of respondents John Redmond, et al. in opposition filed.
8	Jun 18 1984		Petition GRANTED.
			**********
9	Jul 25 1984	G	Motion of the Solicitor General to dispense with printing the joint appendix filed.
11	Aug 2 1984		Order extending time to file brief of petitioner on the merits until September 1, 1984.
12	Aug 23 1984		Motion of the Solicitor General to dispense with printing the joint appendix GRANTED.
13	Sep 6 1984		Brief of petitioner United States filed.
15	Sep 10 1984		Order extending time to file brief of respondent on the merits until October 22, 1984.
16	Oct 22 1984		Record filed.
17	Oct 22 1984		Certified C.A. proceedings, Original record & reporter's transcripts, Volumes I thru VIII, received.
18	Oct 22 1984		SET FOR ARGUMENT. Wednesday, November 28, 1984. (2nd case).
19	Oct 22 1984		Brief of respondents Lyle G. Johns, et al. filed.
20	Nov 1 1984		CIRCULATED.
21	Nov 21 1984	X	Reply brief of petitioner United States filed.
22	Nov 28 1984		ARGUED.

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No.

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In the Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA

v.

LYLE GERALD JOHNS, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether the warrantless probable cause search of bales of marijuana discovered in two pickup trucks, which would have been lawful if undertaken at the scene of the seizure or "soon" after the bales had been taken to the station house, was rendered unlawful by the passage of several days between seizure and search.

PARTIES TO THE PROCEEDING

In addition to the named respondent, Manuel Jesus Duarte, Roberto Leon Gomez, Dennis Eugene Hearron, Carlos Torres Leon, John Lizaraga Redmond, and Jose Oros Soto were defendants in the district court and are respondents here.

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In the Supreme Court of the United States

OCTOBER TERM, 1983

No.

UNITED STATES OF AMERICA

v.

LYLE GERALD JOHNS, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-15a) is reported at 707 F.2d 1093. The district court's opinion (App. B, *infra*, 16a-28a) and its supplemental order and memorandum (App. C, *infra*, 29a-32a) are unreported.

JURISDICTION

The judgment of the court of appeals (App. D, *infra*, 33a) was entered on June 10, 1983. A petition

for rehearing was denied on January 4, 1984 (see App. E, *infra*, 34a). On February 27, 1984, Justice Rehnquist extended the time in which to file a petition for a writ of certiorari to and including April 3, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On September 1, 1981, a grand jury sitting in the District of Arizona returned a two-count indictment charging respondents with conspiracy to possess marijuana with intent to distribute it, in violation of 21 U.S.C. 846, and possession of marijuana with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). Prior to trial, the district court granted respondents' motion to suppress the marijuana that was the basis of the prosecution, and the government appealed pursuant to 18 U.S.C. 3731. The court of appeals affirmed.

1. At approximately 1:30 a.m. on August 4, 1981, United States Customs Officer Scott Eshelman received a report from an unidentified informant of suspicious activity at the Tucson Dragway. The informant related that an airplane had landed at the location outside Tucson and had been met by a car. At the request of Customs officials, the County Sheriff's Department stopped the car as it was leaving the scene. No criminal activity was detected, but the occupants of the vehicle were identified as respondents Johns and Hearron. The two men were allowed to proceed on their way. This information was relayed to Officer Eshelman's superior, Customs Officer Dale Harper. Harper had been investigating Johns for some time and had information linking him with respondents Leon and Duarte in an international drug smuggling operation. App., *infra*, 2a, 17a-18a.

Based on the available information, Officer Harper decided to initiate surveillance at Leon's residence. Finding no vehicles at that location, Harper moved on to Duarte's residence. There he observed pickup trucks belonging to Leon and Duarte. After meeting a third vehicle at a nearby gasoline station, the two pickups proceeded east on Interstate Highway 10. Officer Harper contacted other Customs officers, who maintained ground and air surveillance on the two trucks as they traveled 100 miles to a private airstrip near Bowie, a small town located about 50 miles from the Mexican border. App., *infra*, 2a, 18a-19a.

Shortly after the trucks arrived at the airstrip the first of two small planes that were later identified as belonging to respondents Johns and Hearron landed. The agents on the ground were unable to see what transpired from their vantage point, but their counterparts in the air informed them that one of the pickup trucks had approached the first plane. That plane ultimately departed, and was followed by the second small plane, which landed and later departed. The Customs officers on the ground approached to investigate. As they approached the trucks they detected the odor of marijuana. One of the officers saw one of the respondents throwing a blanket over the contents of one of the trucks. In the trucks the officers found some 40 square packages wrapped in plastic and dark green trash bags secured with tape. App., *infra*, 2a, 19a-20a; 11/9/81 Tr. 134; 12/11/81 Tr. 35.[1]

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[1] One of the officers, an "experienced law enforcement officer[] with many years of on-the-job experience, including the investigation of marijuana cases" (App., *infra*, 22a n.2), testi-

Respondents Duarte, Leon, Gomez, Redmond and Soto were arrested on the ground at the airstrip. Before leaving the scene, the officers noticed some vegetable matter loose on the ground that they believed to be marijuana. Meanwhile, the two small planes were followed back to the vicinity of Tucson by Customs officers in the surveillance airplane. Respondents Hearron and Johns, the pilots, were arrested upon landing. App., *infra*, 2a, 21a-23a.

The packages and bags found in the two pickup trucks were transported to a Drug Enforcement Administration warehouse in Tucson. Subsequently—"[s]everal days" later by the district court's description (App., *infra*, 22a), but see pages 20-21 note 14, *infra*—DEA agents took core samples from some of the bales, which were sent for laboratory analysis and proved to be marijuana. App., *infra*, 2a, 22a.

2. All respondents moved to suppress the contraband, claiming that the warrantless search of the bales of marijuana violated their Fourth Amendment rights. Following an evidentiary hearing, the district court granted the suppression motion (App., *infra*, 16a-28a). Relying on *Robbins* v. *California*, 453 U.S. 420 (1981), the court held that the insubstantial nature of the containers searched did not excuse the officers' failure to secure a warrant (App., *infra*, 23a-27a). The district court refused to apply the auto-

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fied, based upon his experience, that marijuana is commonly packaged in this manner (*id.* at 20a).

At a supplementary hearing on the motion to suppress, one of the Customs officers testified, for the first time, that several of the bags in which the marijuana was found were torn in spots and that the contents of the bags, which appeared to be marijuana, were visible. The district court declined to credit this additional testimony (App., *infra*, 21a-22a n.2).

mobile exception to the warrant requirement on the ground that "[t]he defendants were arrested and the contraband secured at the DEA warehouse" before the search of the bags was carried out (*id.* at 24a). Finally, the district court declined to recognize a "plain odor" exception to the warrant requirement (*ibid.*) and found the evidence insufficient to establish that the plastic-wrapped bales "could have only held marijuana" (*id.* at 27a-28a).[2]

3. While this case was pending on appeal, this Court rendered its decision in *United States* v. *Ross*, 456 U.S. 798 (1982), in the process overruling *Robbins* v. *California*, *supra*, upon which the district court had relied.[3] *Ross* held that the automobile search exception to the warrant requirement permits the warrantless examination of the contents of containers found in a vehicle search conducted upon probable cause, provided that there is probable cause to believe that the container may contain the object of the search. The parties submitted supplemental

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[2] The district court initially found that respondents Johns and Hearron, the pilots, who had delivered the marijuana and departed from the Bowie airstrip prior to its seizure, had not established any "interest in the suppressed evidence" (App., *infra*, 28a) and accordingly lacked standing to seek suppression. But, responding to the court's invitation to supplement their showing in this regard, Johns and Hearron argued that they had made a bailment of the marijuana and retained rights therein sufficient to permit them to challenge the search of the bags. Although these assertions, if credited, would seem to establish that the other five respondents lacked "standing," the district court revised its order of suppression to benefit all respondents (App., *infra*, 29a-32a).

[3] The district court had rejected the government's suggestion that it defer final consideration of the suppression motions pending this Court's disposition of *Ross* (see App., *infra*, 32a).

memoranda addressing the significance of *Ross* for this case. Respondents argued that *Ross* should not be applied here because the search antedated the decision in that case, and asserted that probable cause in this case had focused exclusively upon the plastic wrapped bales and did not extend to the pickup trucks, so that this case would be controlled by *United States* v. *Chadwick*, 433 U.S. 1 (1977), and *Arkansas* v. *Sanders*, 442 U.S. 753 (1979), rather than *Ross*.

While it rejected respondents' arguments respecting the application of *Ross*, the court of appeals nevertheless affirmed the order of suppression (App., *infra*, 1a-15a).[4] The court concluded initially that because *Ross* establishes that warrantless container searches subject to the automobile search doctrine are *not* unlawful, and no legitimate reliance interest would be undercut by its application, *Ross* is fully applicable to searches that antedated its rendition (*id.* at 6a-8a). Second, the court of appeals determined that the focus of the officers' suspicion here was not exclusively upon the plastic-wrapped bales. Emphasizing that law enforcement officers were unable to see the transfer of the bales from the airplane to the pickup trucks, and that the officers did not know the nature and packaging of the contraband transferred before arriving on the scene, the court explained (*id.* at 8a-9a) that "it was not obvious that all the contraband would be in the bales. The [respondents] could have easily secreted other drugs elsewhere in the vehicles."

Although the court of appeals acknowledged that "[t]he officers had probable cause to search both

[4] The court of appeals upheld the district court's ruling according "standing" to the pilots, respondents Johns and Hearron (App., *infra*, 13a-15a).

[pickup] trucks" and that, "[u]nder *Ross*, they also could have opened the packages [without a warrant] as part of that search" even after the packages had been secured at the DEA warehouse (App., *infra*, 9a, 13a), the court held that the taking of core samples from the bags without a warrant was unlawful because of the time elapsed—three days according to the court's account of the facts (*id.* at 2a, 9a), but see pages 20-21 note 14, *infra*—between the seizure of the bags and the ensuing search. The court relied on cases holding that the search incident to arrest doctrine does not permit a warrantless search of property seized from an arrested suspect after the arrest encounter is completed (*id.* at 9a-11a). The court also relied upon the characterization in *Ross*, 456 U.S. at 807 n.9, of *Chambers* v. *Maroney*, 399 U.S. 42, 52 (1970), as extending the automobile search exception to station house searches conducted "soon" after a seizure. The court reasoned that the practical difficulties of guarding an automobile stopped on the highway and the possible dangers of an on-the-spot search—which it believed to be the basis for this extension—"do not apply to a container that may be removed from the vehicle and secured by the police" (App., *infra*, 12a).

Observing that *Ross* had not overruled *Chadwick* or *Sanders*, and that those cases require that a warrant be obtained to conduct a probable cause search of a container not subject to the automobile search doctrine, the court of appeals stated that *Ross* did not justify a warrantless search of "containers no longer in an automobile and secured by the police for three days" prior to the search (App., *infra*, 12a). It stated that the bases for the automobile warrant exception—which it described as the inherent mobil-

ity of automobiles and the impracticability of securing a warrant in cases involving the transportation of contraband—do not apply in these circumstances (*id.* at 13a, 15a). Nor did the court of appeals believe that *Ross* "so destroys the expectation of privacy in a container subject to an automobile search that the container is thereafter subject to search without a warrant" (*id.* at 12a). The court concluded that because the officers "could have easily obtained a warrant" (*id.* at 13a) during the three days between seizure and search, their failure to do so rendered the search unlawful.

The court of appeals also rejected the government's alternative contention that the plain odor of marijuana emanating from the plastic-wrapped bales made it unnecessary to obtain a warrant prior to the search of the packages (App., *infra*, 3a-6a). Although it recognized the contrary decision of the Fourth Circuit in *United States* v. *Haley*, 669 F.2d 201, 203-204 & n.3, cert. denied, 457 U.S. 1117 (1982), the court of appeals held that the odor provided no more than probable cause and that the parcels "did not announce their contents with sufficient clarity to eliminate the need for a warrant" under the exception to the warrant requirement recognized in *Arkansas* v. *Sanders*, 442 U.S. at 764-765 n.13 (App., *infra*, 4a-5a & n.2).

REASONS FOR GRANTING THE PETITION

This is a case in which law enforcement officers lawfully seized two pickup trucks at a remote airstrip near the Mexican border after observing a clandestine nighttime rendezvous between the trucks and two small aircraft. The initial, concededly lawful search of the trucks disclosed that they contained some 40 bales from which the distinct odor of marijuana was emanating. The court of appeals acknowledged that the officers could lawfully have opened the bales on the spot without a warrant, even though all suspects on the scene had been arrested, the trucks were in the custody of the agents, and there was no longer any substantial risk that the bales could be removed or destroyed in the time that would be required to procure a search warrant. Nevertheless, no doubt in large part because the officers already knew (as well as anything can be "known") what the bales contained, they did not go through the empty formality of opening the bales at the time. Several days later, however, they extracted core samples of the substance contained in the bales and sent them to a laboratory for chemical analysis. Because of the delay in undertaking this action, the court of appeals held that a warrant was required and suppressed the marijuana as evidence.

The decision of the court of appeals imposes an arbitrary restriction upon warrantless probable cause automobile searches based upon an aberrant analysis that is incompatible with this Court's decisions. What this Court had painstakingly clarified in a series of decisions from *Chambers* v. *Maroney*, 399 U.S. 42 (1970), through *United States* v. *Ross*, 456 U.S. 798 (1982), has been cast into new confusion by the decision below. Review by this Court is appropriate to rectify this result.

1.a. *Ross* held that the automobile search exception to the warrant requirement recognized in *Carroll* v. *United States*, 267 U.S. 132 (1925), *Chambers* v. *Maroney*, *supra*, and other cases extends to all "containers and packages found inside the vehicle" (456 U.S. at 820; see also *id.* at 822) "in which there is probable cause to believe that [the object of the search] may be found" (*id.* at 824). The Court ob-

served that a warrant to search a vehicle would suffice to authorize the search of containers found therein that could contain the object of the search (*id.* at 821), and it concluded that "the scope of the warrantless search authorized by [the automobile search] exception is no broader *and no narrower* than a magistrate could legitimately authorize by warrant" (*id.* at 825 (emphasis added)). "When a legitimate search is under way * * * nice distinctions between * * * glove compartments, upholstered seats, trunks, and wrapped packages * * * must give way," the Court stated (*id.* at 821), explaining (*id.* at 821 n.28):

> The practical considerations that justify a warrantless search of an automobile continue to apply until the entire search of the automobile and its contents has been completed.

b. The court of appeals' conclusion that a container discovered in the course of a lawful warrantless automobile search may not itself be searched without a warrant because of a lapse of three days between the seizure and completion of the search finds no support in *Ross* or any other decision of this Court. Contrary to the court of appeals' belief (App., *infra*, 12a), *Ross* does not carve out a novel exception to the warrant requirement reflected in *United States* v. *Chadwick*, 433 U.S. 1 (1977), and *Arkansas* v. *Sanders*, 442 U.S. 753 (1979), that must be narrowly construed. Rather, it simply applies the well-established automobile search doctrine recognized in *Carroll* and its progeny to searches of containers found in the course of an auto search (see 456 U.S. at 825). Such container searches were held to be analytically inseparable from the search of an

automobile. Thus *Ross* imports no special limitations upon the automobile search doctrine. The question in this case accordingly must be resolved by reference to this Court's decisions that address the permissible scope of warrantless automobile searches. Those cases indicate that the automobile search doctrine is not rendered inapplicable by the passage of time between seizure of an automobile and completion of a search.

In *Chambers* v. *Maroney*, the Court rejected a challenge to a warrantless station house search of an automobile, conducted at a time when no exigency rendered procurement of a warrant impracticable. The Court first observed that, because probable cause was present, the vehicle could have been searched on the spot without a warrant at the time it was stopped (399 U.S. at 47-52). But the Court declined to limit the opportunity for a lawful warrantless search of the vehicle to the time and place of the seizure, observing that "[t]he probable-cause factor still obtained at the station house" (*id.* at 52). The Court did not comment upon the amount of time that had elapsed between the seizure and the search; plainly it was not a material consideration in the Court's analysis.[5]

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[5] The district court and the court of appeals had upheld the delayed automobile search on a search incident to arrest theory, reasoning that, because it was dark at the time of the arrest (and the seizure of the automobile), it was reasonable to defer the search until it could be conducted at the station house. See *United States ex rel. Chambers* v. *Maroney*, 408 F.2d 1186, 1192 (3d Cir. 1969), aff'g 281 F. Supp. 96, 100 (W.D. Pa. 1968). But this Court rejected the search incident to arrest rationale of the lower courts, stating "the reasons that have been thought sufficient to justify warrantless searches carried out in connection with an arrest no longer

In *Cady* v. *Dombrowski*, 413 U.S. 433 (1973), the Court sustained the warrantless search of the trunk of an automobile that had been towed to a private garage at the direction of police after an automobile accident leading to the arrest of the driver (a police officer) for drunken driving. The search, intended to recover the arrestee's service revolver, did not take place at the scene of the accident, but was conducted at the garage several hours later. The search was sustained on a community protection rationale. Again there was no suggestion that there is any requirement that a warrantless search be conducted at the earliest practical opportunity. Nor was there any such suggestion in *Cardwell* v. *Lewis*, 417 U.S. 583 (1974). Even though the examination of a car did not take place until the day after the seizure (see *id.* at 587-588), *Chambers* v. *Maroney* was deemed controlling. *Id.* at 593-596 (opinion of Blackmun, J.). Significantly, the Court's only comment on the delay

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obtain when the accused is safely in custody at the station house" (399 U.S. at 47). The Court instead sustained the challenged search under the *Carroll* doctrine.

Chambers thus indicates that warrantless automobile searches are free of the contemporaneity requirements ordinarily applicable to searches incident to arrest. The court of appeals' reliance in this case upon its decisions under the search incident to arrest doctrine (App., *infra*, 9a-11a) accordingly is misplaced. Unlike searches incident to arrest, which do not rest on probable cause and are ordinarily predicated upon the circumstances existing at the time of arrest, the justification for a warrantless automobile search, probable cause, does not disappear with the passage of time in a case like this. See pages 16-20, *infra*.

was that it precluded justification of the search as an incident of the arrest. *Id.* at 591 n.7.[6]

The Court's opinion upholding a station house automobile search in *Texas* v. *White*, 423 U.S. 67 (1975), confirms that prompt completion of such a search is not a requirement of the *Carroll/Chambers* doctrine. The Court simply stated that, as in *Chambers*, " '[t]he probable cause factor' that developed at the scene 'still obtained at the station house' " (423 U.S. at 68, quoting *Chambers*, 399 U.S. at 52 (brackets in original)). In the Court's view, a sufficient basis for the search was that "there was probable cause to search respondent's car" (423 U.S. at 68).[7]

Thus this Court's automobile search decisions do not require that a station house search be conducted at any particular time following a seizure. More generally, the Court has repeatedly rejected the notion that the validity of warrantless automobile searches is somehow conditioned upon exigent circumstances that make securing of a warrant impractical. See *United States* v. *Chadwick*, 433 U.S. at 12-13; *Cardwell* v. *Lewis*, 417 U.S. at 595-596 (opinion of Blackmun, J.) ("[W]e know of no case or principle that suggests that the right to search on probable cause * * * [is] foreclosed if a warrant was not ob-

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[6] The Court did observe that completion of the investigating procedures involved in the case could have required that the seizure of the automobile be prolonged for a significant time period. 417 U.S. at 595 n.11 (opinion of Blackmun, J.)

[7] Justice Marshall, joined by Justice Brennan in dissent, stated that it was irrelevant that the search was completed more promptly than a warrant could have been obtained, observing that "*Chambers* took such time elements out of the equation" (423 U.S. at 72 n.*).

tained at the first practicable moment."); *Husty* v. *United States*, 282 U.S. 694, 701 (1931).

Cooper v. *California*, 386 U.S. 58 (1967), upheld the warrantless search of an automobile that did not take place until a full week after the date of seizure (see *id.* at 58). The Court squarely rejected the suggestion—echoed by the court of appeals in this case (App., *infra*, 13a)—that because sufficient time was available to procure a warrant one accordingly was required (386 U.S. at 62):

> It is no answer to say that the police could have obtained a search warrant, for "[t]he relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable." *United States* v. *Rabinowitz*, 339 U.S. 56, 66.

The time limits imposed upon warrantless searches by the court below are irreconcilable with *Cooper* and the analysis employed by this Court's automobile search decisions generally.[8] They also contravene the general principle of Fourth Amendment analysis employed by this Court that "[t]he fact that the protection of the public might, in the abstract, have been accomplished by 'less intrusive' means does not, by itself, render the search unreasonable." *Cady* v. *Dombrowski*, 413 U.S. at 447; see also *Illinois* v. *Lafayette*, No. 81-1859 (June 20, 1983), slip op. 8.

c. *Ross* itself strongly suggests that the court of appeals misapprehended the scope of the automobile search doctrine. The court of appeals seized upon

[8] While the doctrinal basis of *Cooper* is not entirely clear (see 386 U.S. at 61; cf. *Ross*, 456 U.S. at 809 n.11), it rests at least in part upon the diminished expectation of privacy surrounding an automobile, and bears a close family relationship to the automobile search doctrine. See *Chadwick*, 433 U.S. at 12; see also *Cady* v. *Dombrowski*, 413 U.S. at 439-448. No principled basis exists for distinguishing *Cooper* here.

the observation in a footnote in *Ross*, 456 U.S. at 807 n.9, that *Chambers* v. *Maroney* and *Texas* v. *White* establish that if an immediate search on the street is permissible without a warrant, a search "soon thereafter" is permissible (App., *infra*, 11a). But this descriptive passage simply alluded to and reaffirmed the teaching of *Chambers* and *White*. It obviously was not intended to create or define an outside temporal limit upon the completion of a warrantless automobile search.[9]

In fact, the principle inferred by the court of appeals is contrary to the rule stated repeatedly by the Court in *Ross* (456 U.S. at 823, 825): that the scope of a warrantless automobile search is commensurate with that which a magistrate could authorize based upon the probable cause available to the officers. If the search of the respondents' pickup trucks had been authorized by warrant, the officers undertaking the search of the bales of marijuana would not have been required to procure a second warrant to complete that procedure simply because three days had elapsed between the seizure of the bales and their opening. Cf. *Ross*, 456 U.S. at 820-821 & n.27. Rather, absent a showing that the completion of the search violated the reasonableness standard of the Fourth Amendment in some concrete respect (or violated the time limit fixed by the original warrant), completion of the search would have been authorized by the original

[9] The facts of *Ross* include both a preliminary on-the-street search of an automobile trunk in which a container (a paper bag) was opened, and a subsequent, more thorough, station house search of the car in which an additional container (a zippered red leather pouch) was opened (456 U.S. at 801). Ross argued (Resp. Br. at 6-7, 13-21) that *Chambers* v. *Maroney* should be overruled. But he did not argue that the timing of the station house search was impermissible.

warrant. There is no more justification here than in the hypothetical case we have posed for requiring an additional authorization for completion of the search.[10]

d. Contrary to the court of appeals' suggestion (App., *infra*, 11a-12a), the policies that underlie extension of the auto search doctrine to encompass station house searches subsequent to a seizure are not rendered inapplicable by the passage of time between the seizure and search. As this Court explained in *Ross*, 456 U.S. at 807 n.9, warrantless station house searches are permitted both because of the "practicalities of the situations presented"—*i.e.*, the hardship and inconvenience that might result if a warrantless search could be undertaken only at the scene of the seizure—and because of the "relatively minor protection that a contrary rule would provide for privacy interests." While the first of these factors may shed little light on the question whether a station house search must be undertaken at the earliest practical time, the second factor has undiminished vitality

[10] We note that while the Fourth Amendment requires that warrants "particularly describ[e] the place to be searched or the persons or things to be seized," there is no comparable requirement that the timing of a search be specified, much less that it be stated with particularity. Fed. R. Crim. P. 41 (c) (1) requires, however, that a warrant specify a period of time not to exceed ten days, within which it is to be executed. The search in this case obviously was completed considerably more promptly than that. While even the ten day limit would serve little purpose in the present context (see pages 19-20, *infra*), it is clear, at a minimum, that the court of appeals' decision has the effect of restricting warrantless automobile searches to a narrower compass than a warrant would have authorized.

in this setting. Moreover, the Court has made clear that no case-by-case examination of the strength of these factors in a particular setting is required, but rather that the doctrine is an effort to formulate a "more general rule" that is reasonable for the broad run of cases, even if application to particular cases may "appear unsatisfactory" (*ibid.*). Accordingly, the policies underlying *Chambers* and *Ross* are fully applicable here.[11]

The court of appeals seemed to assume (App., *infra*, 12a) that because of the separation of the bales from the trucks the automobile search doctrine could no longer apply, and that the bales had to be regarded as containers subject to the warrant requirement of *Chadwick* and *Sanders*. But reliance on this location factor misses the point of this Court's decisions. The applicability of *Ross* depends not on the location of a container at some time after the search of a vehicle has begun, but upon the focus of the probable cause that authorized the automobile search and the warrantless seizure of the container. 456 U.S. at 818-819, 823-824. Obviously, at some juncture in the course of an automobile search that discloses the presence of containers that are suspected

[11] Thus the court of appeals' assertion (App., *infra*, 12a) that the rationale for permitting station house searches "do[es] not apply to a container that may be removed from the vehicle and secured by police" is simply incorrect. In any event, this reasoning, which the court of appeals attributed to *Chadwick*, is inconsistent with the fundamental premise of *Ross*—that the search of a container found in the course of an automobile search should be regarded as part of the automobile search.

of harboring the object of the search, the containers ordinarily will be separated from the vehicle. Indeed, this separation will often occur at or before the time the container is secured in police custody at the station house. Insofar as the decision of the court of appeals depends on removal of the containers from the vehicle rather than on the passage of time, it accordingly would have the effect of rendering *Chambers* inapplicable to searches of suspicious containers discovered in the course of a lawful warrantless automobile search. This result would largely overrule *Ross*, which teaches that such searches are not to be distinguished from the search of an automobile itself. See also *New York* v. *Belton*, 453 U.S. 454, 461-462 n.5 (1981).[12] And subsequent to *Ross*, in *Michigan* v. *Thomas*, 458 U.S. 259 (1982), this Court has once again emphasized that the automobile search doctrine is not to be limited as the court of appeals did here.[13]

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[12] In *Belton* the Court rejected the "fallacious theory" that a seizure of property associated with a defendant afforded police such complete control over the encounter as to eliminate the justification for a search incident to arrest, noting that under this analysis "no search or seizure incident to a lawful custodial arrest would ever be valid" (453 U.S. at 462 n.5). The decision below adopts a comparably fallacious approach to the search of containers found in an automobile search.

[13] *Thomas* states (458 U.S. at 261):

> In *Chambers* v. *Maroney*, 399 U.S. 42 (1970), we held that when police officers have probable cause to believe there is contraband inside an automobile that has been stopped on the road, the officers may conduct a warrantless search of the vehicle, even after it has been impounded and is in police custody. We firmly reiterated this holding in *Texas* v. *White*, 423 U.S. 67 (1975). See

Accordingly, there is no principled justification for the court of appeals' conclusion that the passage of time between seizure of the marijuana and the taking of core samples rendered the automobile search doctrine inapplicable here. Nor is any legitimate interest of an owner of seized property invaded by permitting a warrantless search in circumstances such as are presented here. Rather than identify any such interest, the court of appeals was content to suggest (App., *infra*, 13a) that the policies underlying the automobile search doctrine itself have no application here. This simply ignores the "diminished expectation of privacy which surrounds the automobile," which provides a principal justification for the automobile search doctrine itself. See *United States* v. *Chadwick*, 433 U.S. at 12; see also *South Dakota* v. *Opperman*, 428 U.S. 364, 367-368 (1976). *Ross* teaches that this diminished expectation of privacy extends both to "a vehicle and its contents * * * if probable cause is given to believe that the vehicle is transporting contraband" (456 U.S. at 823), and reaffirms that limiting warrantless searches to on-the-spot examinations undertaken immediately would provide no significant protection for privacy interests (*id.* at 807 n.9).

The court of appeals did not explain how the passage of time between seizure of a container and its search serves at all to alter the individual's expectation of privacy in the container. In fact, the residual expectation of privacy in these circumstances is

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> also *United States* v. *Ross*, 456 U.S. 798, 807, n.9 (1982). It is thus clear that the justification to conduct such a warrantless search does not vanish once the car has been immobilized * * *.

neglible, at best. Because the officers needed no warrant—even under the court of appeals' view of the law—to open the bales they had seized at the Bowie airstrip or "soon" after their arrival at the DEA warehouse, any expectation that their contents would remain secret here would be wholly unreasonable. See *Illinois* v. *Andreas*, No. 81-1843 (July 5, 1983), slip op. 5, 7-8; *United States* v. *Edwards*, 415 U.S. 800, 805-808 (1974).

The pointlessness of the Ninth Circuit's rule is especially evident on the facts of this case, because the clear odor of marijuana emanating from the large cache of marijuana seized, as well as the characteristic appearance of the marijuana bales and the events preceding the seizure, obviated any need for an investigative search to ascertain the nature of the contents of the bales. Indeed, on the facts of this case a strong argument could be made that the containers announced their contents and accordingly "by their very nature [could not] support any reasonable expectation of privacy" sufficient to trigger a warrant requirement. *Arkansas* v. *Sanders*, 442 U.S. at 764-765 n.13; see *United States* v. *Jacobsen*, No. 82-1167 (Apr. 2, 1984), slip op. 10 n.17; *Texas* v. *Brown*, No. 81-419 (Apr. 19, 1983), slip op. 5-6 & n.5 (Stevens, J., concurring in the judgment). But there is no need to reach that question here; at a minimum, the odor and appearance of the marijuana bales assuredly was sufficient to preclude any enhanced expectation of privacy from arising because of the lapse of time between the seizure and the actual penetration of the interior of the bales. Assuming that a significant delay in completing the search in fact occurred here,[14]

[14] We do not believe that the record supports the court of appeals' characterization of the facts of this case in this regard. The only evidence of which we are aware that bears on this point indicates that the core samples were taken the day after the seizure (12/11/81 Tr. 61). In the court of appeals respondents Duarte, Leon, Soto, Gomez and Redmond asserted (Br. 3) that there had been a lapse of three days, but the stipulation reflected in the transcript pages cited in support of this assertion (11/9/91 Tr. 5) simply does not address the timing of the station house search. Our argument in this Court, however, does not in any respect depend upon our disagreement with the court below as to these facts.

the explanation appears to be that the officers were justifiably confident that they already knew precisely what they had found. In these circumstances, it is peculiar indeed to conclude that the mere passage of a few days' time made unreasonable the next investigative step preparatory to prosecution: the removal of core samples for laboratory analysis.[15]

2.a. The court of appeals' decision conflicts with the decisions of other courts of appeals that have understood *Ross* to be applicable in circumstances remarkably similar to those presented here. For instance, in *United States* v. *Rivera*, 684 F.2d 308 (5th Cir. 1982), the court of appeals concluded that *Ross* required it to uphold a warrantless search of plastic wrapped bundles that proved to contain marijuana.[16] Yet the search in that case—which, as in this case, took the form of extraction of core samples from the bales of marijuana—occurred more than 48 hours after the seizure of the bales. See *United States* v.

[15] Indeed, if anything, delay in the conduct of the search is beneficial to persons whose property has been seized, since it affords them an opportunity, if they have a substantial challenge to the lawfulness of the seizure, to move for relief under Fed. R. Crim. P. 41(e) before any search occurs.

[16] *Rivera* had been held by the court of appeals, upon the government's petition for rehearing, pending this Court's decision in *Ross* (see 684 F.2d at 309).

Rivera, 654 F.2d 1048, 1050 (5th Cir. 1981).[17] Similarly, in *Sharpe* v. *United States*, 712 F.2d 65 (4th Cir. 1983), petition for cert. pending on other issues, No. 83-529, the court of appeals recognized that *Ross* required it to "disavow" as "no longer valid" its prior ruling that a warrantless search of marijuana bales seized in the search of a pickup truck was unlawful. Yet the search in question had occurred at least two or three days after the seizure. See *Sharpe* v. *United States*, 660 F.2d 967, 969 (4th Cir. 1981).[18] The Third Circuit has also expressed an understanding of this Court's teaching on the timing of automobile searches that is inconsistent with that of the Ninth Circuit. *United States* v. *Schecter*, 717 F.2d 864, 870-871 (1983).

b. As we have indicated (pages 19-21, *supra*), the decision of the court of appeals does not serve to protect any legitimate or reasonable expecta-

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[17] The cited opinion is the initial opinion of the Fifth Circuit in *Rivera*, which was vacated by that court following this Court's decision in *Ross*.

[18] This Court granted our petition for a writ of certiorari seeking review of the court of appeals' 1981 decision in *Sharpe*, vacated the court of appeals' judgment, and remanded for further consideration in light of *Ross*. *United States* v. *Sharpe*, 457 U.S. 1127 (1982). That remand prompted the court of appeals' disavowal of its prior ruling on the warrant issue. We note that when the case initially came before the court of appeals, in 1981, Judge Russell, in dissent, had emphasized that the bales had not been opened for two or three days and had concluded, in light of *Chambers* v. *Maroney*, that the delay had no legal significance. 660 F.2d at 981-982. The court of appeals' ultimate conclusion on remand that *Ross* controlled the search issue in the case accordingly cannot be attributed to failure to consider the significance, if any, of the delay.

tion of privacy that could be harbored by the owner of a suspicious container seized by police upon probable cause in the course of a legitimate warrantless search of a motor vehicle. Nor does the arbitrary time limit adopted advance any other identifiable interest of such individuals. On the contrary, if it is required, the police will simply adopt the practice of completing searches at the place of seizure or shortly after the property has been secured at the station house—albeit at some cost to the timely accomplishment of other law enforcement tasks that are objectively more pressing, such as attending to the prompt initial appearance of arrested suspects before a judicial officer or preparing contemporaneous reports of their investigations.

Of course, there may be cases in which it is impossible to complete a search within the ambiguously defined interval allowed by the court of appeals. See, *e.g.*, *Cardwell* v. *Lewis*, 417 U.S. at 595 n.11 (opinion of Blackmun, J.). It is not at all clear from the court of appeals' opinion whether a warrant would be required where the court is satisfied that the delay meets some standard of reasonable justification, or, perhaps, absolute necessity. But even assuming that the court of appeals would not press the present ruling that far, the result would be to thrust upon the courts the burden of assessing, on a case by case basis, whether the delay was "too long" in light of the factors that explain it, even though the outcome of this inquiry in no way promotes substantial individual privacy interests.

c. In *Ross* the Court undertook to provide "clarification" (456 U.S. at 804) concerning the scope of the automobile search doctrine and its application to containers that are found in the course of an auto-

mobile search. The Court noted the special "importance of striving for clarification in this area of the law," observing that "countless vehicles are stopped on highways and public streets everyday, and * * * that it is not uncommon for police officers to have probable cause to believe that contraband may be found in a stopped vehicle" (*id.* at 803-804). For the same reasons, it is appropriate for the Court to restore the clarity that prevailed prior to the decision of the court below. Because the decision of the court of appeals appears so plainly to conflict with this Court's decision in *Ross* and the consistent thread of this Court's other automobile search decisions, summary reversal may be appropriate.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APRIL 1984

APPENDIX A

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 82-1080

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

LYLE GERALD JOHNS, DENNIS EUGENE HEARRON, MANUEL JESUS DUARTE, CARLOS TORRES LEON, JOSE OROS SOTO, ROBERTO LEON GOMEZ, and JOHN LIZARAGA REDMOND, DEFENDANTS-APPELLEES

Argued and Submitted Nov. 12, 1982

Decided June 10, 1983

Appeal from the United States District Court
for the District of Arizona

Before TRASK, ANDERSON, and CANBY, Circuit Judges.

CANBY, Circuit Judge.

United States Customs Officers seized securely wrapped packages of marijuana from two covered pickup trucks and, three days later, opened the packages without a warrant. The trial court granted the defendants' motion to suppress the evidence. The government appeals, raising several possible exceptions to the warrant requirement. We conclude that this warrantless search violated the Fourth Amendment and accordingly, we affirm.

FACTS

After midnight on Tuesday, August 4, 1981, customs officers, suspecting that a drug transaction might occur, began ground and air surveillance of two trucks. Shortly after the trucks stopped near a remote private airstrip southeast of Bowie, Arizona, two small airplanes landed in sequence. After both planes left, the officers approached the two trucks and smelled the odor of marijuana in the general area of the trucks. An officer looked inside the trucks and discovered several sealed boxes and plastic bags. Officers then arrested the five defendants present at the two trucks; later, other officers arrested the two airplane pilots. The agents seized the boxes and bags and took them to the Drug Enforcement Administration warehouse in Tucson, Arizona. Three days later, without obtaining a search warrant, federal agents opened some of the bales and took core samples, which laboratory analysis proved were marijuana.

After a hearing, the district court granted a motion to suppress the evidence seized. Initially, the court suppressed the evidence only against the five defendants arrested at the trucks, but later the court amended its order to include the two pilots as well.

DISCUSSION

The government contends that the trial court erroneously suppressed the packages of marijuana seized from the trucks. The government asserts that two exceptions to the warrant requirement potentially apply here. Under the government's first theory, the marijuana in the wrapped bales was in plain view. Alternatively, the government proposes that the agents had authority to search the bales under the automobile exception. In addition, the govern-

ment argues that, even if the search here fits within neither exception, Johns and Hearron, the airplane pilots, lacked an expectation of privacy that would permit them to challenge the search. We take each issue in turn.

I. *Plain View*

The government argues that because of the surrounding circumstances and the odor of marijuana coming from the trucks, no warrant was required to open the packages because the contents were in plain view.[1] When officers are legitimately in a location where they observe an unconcealed object, the discovery does not constitute a search. *See Katz v. United States*, 389 U.S. 347, 351, 88 S.Ct. 507, 511, 19 L.Ed.2d 576 (1967); *Ker v. California*, 374 U.S. 23, 42-43, 83 S.Ct. 1623, 1634-35, 10 L.Ed.2d 726 (1963).

The government relies on the experience of the officers, the extent of the investigation, and the circumstances of the seizure as the basis for its contention that the contents of the packages were in plain view. The government draws some support from the recently decided case of *Texas v. Brown*, —— U.S. ——, 103 S.Ct. 1535, 75 L.Ed.2d 502 (1983), in which the plain view doctrine was applied to uphold the warrantless seizure of an opaque, knotted party

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[1] The government also argued that the wrapped containers were "mere cargo," to which no Fourth Amendment privacy interests attached. Distinctions based on the likelihood that a particular closed, opaque container contains personal effects are no longer permissible. *See United States v. Ross*, 456 U.S. 798, 102 S.Ct. 2157, 2171, 72 L.Ed.2d 572 (1982). Since *Ross*, we no longer need distinguish between "worthy" and "unworthy" containers.

balloon containing heroin. As we read the plurality and concurring opinions in *Brown*, however, they establish only that the *seizure* of the container in plain view was justified when there was probable cause to believe that it contained contraband. We have no difficulty in agreeing that in the present case, the officers acted lawfully and justifiably in seizing the packages. It is a different question, however, whether an opaque container that is properly seized may be searched.

> If a movable container is in plain view, seizure does not implicate any privacy interests. Therefore, if there is probable cause to believe it contains contraband, the owner's possessory interest in the container must yield to society's interest in making sure that the contraband does not vanish during the time it would take to obtain a warrant. The item may be seized temporarily. It does not follow, however, that the container may be opened on the spot. Once the container is in custody, there is no risk that evidence will be destroyed. Some inconvenience to the officer is entailed by requiring him to obtain a warrant before opening the container, but that alone does not excuse the duty to go before a neutral magistrate.

Id. —— U.S. at ——, 103 S.Ct. at 1547 (Stevens, J., joined by Brennan, Marshall, JJ., concurring). We conclude, therefore, that *Brown* does not support the warrantless search here.[2]

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[2] We decline to hold that the contents of the wrapped bales were in plain view as "containers (for example a kit of burglar tools or a gun case) [which] by their very nature cannot support any reasonable expectation of privacy because

The government contends that the odor detected by the agents, emanating from the marijuana, brought that contraband into plain view. The Fourth Circuit does consider a package which gives off a distinctive odor to be like a package wrapped in transparent material, making the contents objectively obvious. *United States v. Haley*, 669 F.2d 201, 203-04 & n.3 (4th Cir.), *cert. denied*, 457 U.S. 1117, 102 S.Ct. 2928, 73 L.Ed.2d 1329 (1982). Our precedent, however, directs that while the odor of marijuana smelled by the agents would contribute to probable cause to believe that the container held contraband, a recognized exception to the warrant requirement was necessary to justify a warrantless search. *United States*

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their contents can be inferred from their outward appearance." *Ross*, 102 S.Ct. at 2167 n. 19 (quoting *Arkansas v. Sanders*, 442 U.S. 753, 764 n. 13, 99 S.Ct. 2586, 2593 n. 13, 61 L.Ed.2d 235 (1979)). *See also Robbins v. California*, 453 U.S. 420, 427-28, 101 S.Ct. 2841, 2846-47, 69 L.Ed.2d 744 (1981). The wrapped bales here did not announce their contents with sufficient clarity to eliminate the need for a warrant. The government implicitly recognized that fact in the district court. At the reopened hearing on the motion to suppress, a government witness testified that the packages were torn, exposing the marijuana to plain view and obviating the necessity of opening the packages to remove samples. The trial court found this strikingly new testimony to be not credible.

Nor can we say that the viewing of the packages by the agents in this case was "inadvertent," as required for application of the plain view doctrine by the plurality opinion in *Coolidge v. New Hampshire*, 403 U.S. 443, 470, 91 S.Ct. 2022, 2040, 29 L.Ed.2d 564 (1971). We do not rest our decision on this ground because it is uncertain whether the "inadvertence" requirement survived *Texas v. Brown*, —— U.S. ——, ——, 103 S.Ct. 1535, 1542-44, 75 L.Ed.2d 502 (1983) (plurality opinion of Rehnquist, J.; concurring opinion of White, J.).

v. Ogden, 485 F.2d 536, 539-40 (9th Cir. 1973), *cert. denied*, 416 U.S. 987, 94 S.Ct. 2392, 40 L.Ed.2d 764 (1974).[3] The odor and circumstances of the seizure supplied the probable cause for a search warrant. They did not eliminate the need for one.

II. *Automobile Exception*

The government next contends that the warrantless search was justified under the automobile exception to the warrant requirement. For that contention to succeed, three conditions must be met. First, the Supreme Court's decision in *United States* v. *Ross*, 456 U.S. 798, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982), must have retroactive effect. Second, *Ross* must apply to the facts of this case. Finally, the three-day delay must not invalidate the warrantless automobile search.

A. The Retroactivity of *Ross*

In *United States v. Ross*, 456 U.S. 798, 824, 102 S.Ct. 2157, 2172, 72 L.Ed.2d 572 (1982), the Supreme Court rejected the rule of *Robbins v. Califor-*

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[3] Thus, most of our cases turn on whether the automobile exception, as then defined, applied to the searches of the containers. *See, e.g., United States v. Solomon*, 528 F.2d 88 (9th Cir. 1975); *United States v. Gibbs*, 435 F.2d 621 (9th Cir. 1970), *cert. denied*, 401 U.S. 994, 91 S.Ct. 1233, 28 L.Ed.2d 532 (1971).

The Second Circuit also has rejected the view that a distinctive odor can bring the contents of a container into plain view. *United States v. Dien*, 609 F.2d 1038, 1045 (2d Cir. 1979). *See also United States v. Johnson*, 588 F.2d 147 (5th Cir. 1979). While the results in *Dien* and *Johnson* would be different now after *Ross*, that does not affect their analysis of whether the odor of marijuana in the vehicle brings the contents of the packages into plain view.

nia, 453 U.S. 420, 101 S.Ct. 2841, 69 L.Ed.2d 744 (1981), relied on by the district court when it granted the defendants' suppression motion. In *Robbins*, the Court considered whether police officers entitled to conduct a warrantless search of an automobile stopped on a public roadway may open a container found within the vehicle. The Court reversed Robbins' conviction on the ground that a closed opaque container "may not be opened without a warrant, even if it is found during the course of the lawful search of an automobile." *Id.* at 428, 101 S.Ct. at 2847.

The following year, in *Ross*, the Court reexamined the automobile exception and concluded that "[i]f probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search." 102 S.Ct. at 2172. The government argues that the decision in *Ross* must control here, requiring reversal, while the appellees contend that the decision should not be given retroactive effect.

This court already has applied *Ross* retroactively, although without discussion of the issue. *United States v. Cleary*, 683 F.2d 313 (9th Cir. 1982). *See also United States v. Rivera*, 684 F.2d 308 (5th Cir. 1982). The opinion in *Ross* indicates that the Supreme Court intended the rule to apply retroactively. *See* 102 S.Ct. ot 2172 ("[I]t is clear that no legitimate reliance interest can be frustrated by our decision today"). No other result makes sense. The purpose of refusing to apply retroactively a new decision enforcing the exclusionary rule is to avoid penalizing police conduct when the police reasonably relied on existing judicial precedent. *United States v. Peltier*,

422 U.S. 531, 537-39, 95 St.Ct. 2313, 2317-18, 45 L.Ed.2d 374 (1975); *see, e.g., United States v. Stewart*, 595 F.2d 500, 504 (9th Cir. 1979). When a court determines that a particular police practice does *not* violate the Constitution, there is no reason not to apply that decision retroactively. "Because the Supreme Court has declared searches such as those involved here to be constitutional, no police misconduct has in fact occurred. Hence, there is no misbehavior to be deterred, and the interest in maintaining judicial integrity is not implicated, especially in light of the previously unsettled state of the law in this area." *United States v. Burns*, 684 F.2d 1066, 1074 (2d Cir. 1982) (applying *Ross* retroactively).

B. The Applicability of *Ross*

The appellees argue that even if *Ross* is given retroactive effect, it does not apply here. They argue that the customs agents must have known that the packages contained all the contraband, so that their suspicion should have focused exclusively on the packages and not on the trucks. As a consequence, the automobile search was unauthorized and a warrant was required to search the containers under the rule of *United States v. Chadwick*, 433 U.S. 1, 97 S.Ct. 2476, 53 L.Ed.2d 538 (1977). *Ross* did not purport to overrule *Chadwick*.

The customs officers, however, remained some distance away while the defendants placed the packages inside the trucks. The officers did not see the packages nor have a chance to seize the contraband until after loading. The officers had probable cause to search both vehicles, not just the newly-discovered bales. Their suspicion did not focus solely on the packages; it was not obvious that all the contraband

would be in the bales. The appellees could have easily secreted other drugs elsewhere in the vehicles.

In *United States v. Chadwick*, 433 U.S. 1, 97 S.Ct. 2476, 53 L.Ed.2d 538 (1977), the police officers had all the facts giving them probable cause to believe that contraband was in the footlocker and the suitcases before those containers were placed in the trunks of the cars. Placing the containers in the cars did not give the officers probable cause to search the entire vehicle. In *Ross* and in this case, the officers' suspicions were not so specific. They did not know the exact nature and packaging of the contraband transferred from the airplanes to the trucks before arriving on the scene. The officers had probable cause to search both trucks. Under *Ross*, they also could have opened the packages as part of that search.

C. The Three-Day Delay

We next must determine whether the fact that the packages could have been searched without a warrant at the time of their seizure means that they could be searched without a warrant some three days later at the government warehouse. We believe that the clear thrust of our precedent answers that question in the negative, and that nothing held or said in *Ross* leads to a different conclusion.

In *United States v. Monclavo-Cruz*, 662 F.2d 1285 (9th Cir. 1981), an officer arrested a female passenger of an automobile and seized her purse, which was either in her hand, on her lap, or on the seat beside her. He did not search the purse immediately, but did so about an hour later in his office, where he had taken both the purse and its owner. We assumed that the initial seizure of the purse was lawful as incident to the owner's arrest, but held that the sub-

sequent search was invalid for lack of a warrant. It made no difference, we said, that the officer was prevented from making the search at the time of the arrest because he believed it would have created a security risk. "The fact that an officer is prevented from conducting a [permissible search at the time of the arrest] is not a sufficient reason to justify a search an hour later at the station. The protection rationale for the search no longer applies." *Id.* at 1288.

In *United States v. Burnette*, 698 F.2d 1038 (9th Cir. 1983), police officers arrested the defendant on probable cause and seized the purse she was carrying. They conducted a cursory search of the purse at that time, and subsequently conducted a more thorough warrantless search at the police station. We held that the search at the station did not violate the Fourth Amendment because the initial search, properly conducted at the time of the arrest, diminished or destroyed any privacy interest the owner had in the contents of the purse. As long as the purse thereafter remained in police possession, it could be searched without a warrant. *Id.* at 1049-50. We pointed out, however, that "[w]here such a container is not searched immediately, . . . but is instead taken to the police station and searched later, a warrant is required. *United States* v. *Monclavo-Cruz*, 662 F.2d 1285 (9th Cir. 1981)." *Id.* 698 F.2d at 1049. Moreover, the dissent in *Burnette* was based on the sole ground that the record did not support the finding that the officers had in fact searched the purse at the time of the arrest. *See id.* at 1052-56 (Norris, J., dissenting). Neither the majority's reference to *Monclavo-Cruz* nor the dissent would make much sense if a warrantless station-house search were rendered

lawful by the fact that an earlier search *could* have been made lawfully without a warrant.

The starting premise for both cases is that warrantless searches are *per se* unreasonable under the Fourth Amendment, subject only to narrowly prescribed exceptions confined to the circumstances that gave rise to those exceptions. *Coolidge v. New Hampshire*, 403 U.S. 443, 455, 91 S.Ct. 2022, 2032, 29 L.Ed.2d 564 (1971); *see United States v. Martin*, 693 F.2d 77, 78 (9th Cir. 1982) (per curiam). Both *Monclavo-Cruz* and *Burnette* dealt with searches of items initially subject to search incident to a lawful arrest. There was no reason to stretch that exception to the warrant requirement so as to permit a later search at the police station, where "there is no longer any danger that the arrestee might gain access to the property to seize a weapon or destroy evidence." *United States v. Chadwick*, 433 U.S. at 15, 97 S.Ct. at 2485. In the present case, however, the containers were subject to initial search as part of the automobile exception to the warrant requirement, under the holding of *Ross*. We must therefore examine *Ross* further to determine whether anything in its rationale supports the warrantless searches conducted in this case.

The automobile exception permits a warrantless search not only at the spot where the automobile is stopped but also at the police station "soon thereafter" if the vehicle is impounded. *Ross*, 102 S.Ct. at 2163 n.9 (citing *Chambers v. Maroney*, 399 U.S. 42, 52, 90 S.Ct. 1975, 1981, 26 L.Ed.2d 419 (1970), and *Texas v. White*, 423 U.S. 67, 96 S.Ct. 304, 46 L.Ed.2d 209 (1975)). This extension of the automobile exception resulted, however, from the practical difficulties associated with the detention of an automobile on

a public highway and the possible dangers of a search there. *See Chambers v. Maroney*, 399 U.S. at 52, 90 S.Ct. at 1981; *Ross*, 102 S.Ct. at 2163 n.9, 2166 n.18. Those considerations do not apply to a container that may be removed from the vehicle and secured by the police, as the Supreme Court held in *Chadwick*, 433 U.S. at 13 n.7, 97 S.Ct. at 2484 n.7.

Ross allows the police to search, either in the automobile or soon thereafter at the station, all containers, closed or open, which there is probable cause to believe may conceal the proper object of the search. *Ross* does not, however, overrule the holding of *Arkansas v. Sanders*, 442 U.S. 753, 99 S.Ct. 2586, 61 L.Ed.2d 235 (1979), that a warrant is needed for search of a closed container in the hands of the police that is not part of an automobile search itself. We therefore find nothing in *Ross's* expansion of the automobile search exception to justify extending it to containers no longer in an automobile and secured by the police for three days prior to a warrantless search.[4]

Moreover, nothing in the *Ross* decision so destroys the expectation of privacy in a container subject to an automobile search that the container is thereafter subject to search without a warrant. First, *Ross* allows the police to search all containers only if they have probable cause to search the vehicle. If there is probable cause to search only a container, the automobile exception does not apply. *Ross* did not overrule *Chadwick* or the holding in *Sanders*. *See Ross*,

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[4] *See, e.g., United States v. Cleary*, 656 F.2d 1302, 1303 (9th Cir. 1981), *vacated*, 457 U.S. 1113, 102 S.Ct. 2919, 73 L.Ed.2d 1324, *on remand*, 683 F.2d 313 (9th Cir. 1982) (search apparently occurred immediately after bag taken to police station and therefore was part of search of van).

102 S.Ct. at 2168 (quoting *Robbins v. California*, 453 U.S. at 435, 101 S.Ct. at 2850 (Powell, J., concurring)); *Ross*, 102 S.Ct. at 2172. *Chadwick* holds that placing a package in an automobile does not destroy the expectation of privacy in that package. Second, our decision in *Burnette* would never have reached the merits if the fact that the police could have (but did not) search a container forever destroys the expectation of privacy in its contents.

We again emphasize the factual basis of our holding. Customs officers had probable cause to believe the two trucks contained contraband. Under *Ross*, they could have immediately inspected the packages as part of the inspection of the trucks. The officers also could have searched the trucks and packages soon thereafter at their headquarters. Instead, they chose to seize and impound the packages. They stored the packages for three days and then opened them without a warrant.

The officers could have easily obtained a warrant at any time during those three days. Exceptions to the warrant requirement are limited and narrowly prescribed. Neither basis for the automobile exception—the impracticality of serving a warrant for the transportation of contraband, *see Ross*, 102 S.Ct. at 2163, and the special mobility of automobiles, *id.* at 2165—applies to packages secured for three days at a government warehouse.

III. *Standing*

Unlike the other five defendants, whom the officers arrested at the airstrip, Johns and Hearron had departed in their airplanes a few minutes before the search of the vehicles and seizure of the containers of marijuana. The district court found that Johns and

Hearron had standing to object to the search of the packages because they shared a bailor/bailee relationship with the other five defendants, who were not to be paid until after delivery of the marijuana. Moreover, the court found that the pilots had an interest in the packages sufficient to maintain a reasonable expectation of privacy in their contents.[5]

Unlike *Rawlings v. Kentucky*, 448 U.S. 98, 105, 100 S.Ct. 2556, 2561, 65 L.Ed.2d 633 (1980), this case does not involve a "precipitous" bailment to which the bailee had not consented. Johns and Hearron owned the drugs. *United States v. Salvucci*, 448 U.S. 83, 91, 100 S.Ct. 2547, 2552, 65 L.Ed.2d 619 (1980).[6] While the pilots lost their power to exclude others from inspecting the packages, that fact is not determinative under our precedent. *United States v. Perez*, 689 F.2d 1336, 1338 (9th Cir. 1982) (per curiam).[7] Like the defendants in *Perez*, Johns and Hearron have met their burden of showing a reasonable expectation of privacy based on their formalized arrangement with the other five defendants for the transportation of the contraband. The pilots' interests in the packages when opened are indistinguish-

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[5] The government does not challenge the standing of the other five defendants to object to the search.

[6] After its acquiescence at the suppression hearing, the government cannot now contend that the record does not show that Johns and Hearron had any continuing interest in the marijuana. *See Steagald v. United States*, 451 U.S. 204, 209, 101 S.Ct. 1642, 1646, 68 L.Ed.2d 38 (1981); *United States v. Anderson*, 663 F.2d 934, 938-39 n. 4 (9th Cir. 1981).

[7] *But see United States v. DeLeon*, 641 F.2d 330, 337 (5th Cir. 1981) (no expectation of privacy in articles committed to the custody of coconspirators).

able from those of the other defendants. *Id.* The pilots have standing.

CONCLUSION

The warrantless search here violated the Fourth Amendment and the district court correctly suppressed the evidence thus obtained. Although the containers were in plain view, the marijuana inside them was not. While *Ross* holds that the officers could have searched the packages, either on the spot or shortly thereafter, the automobile exception does not allow a warrantless search of containers seized and secured by the police for three days before the search. The rationale for the automobile exception to the warrant requirement then no longer applies. Finally, the district court correctly found that Johns and Hearron had standing.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CR 81-188 TUC ACM

UNITED STATES OF AMERICA, PLAINTIFF

vs.

LYLE GERALD JOHNS, ET AL., DEFENDANTS

[Filed Jan. 8, 1982]

MEMORANDUM OF DECISION AND ORDER

This memorandum and order addresses the question of the legality of a Drug Enforcement Agency's (DEA) warrantless search and taking of core samples of marijuana out of sealed boxes and garbage bags taken from five of the defendant's possession at an isolated private air strip near Bowie, Arizona.

On September 1, 1981, a grand jury for the United States District Court for the District of Arizona indicted the seven defendants. The first count of the indictment charges the defendants with conspiring to possess marijuana with the intent to distribute it and conspiring to distribute marijuana, in violation of 21 U.S.C. § 846. All of the defendants are also charged with violation of 21 U.S.C. § 841(a)(1), possessing marijuana with the intent to distribute it. The defendants have made numerous motions, including a motion to suppress evidence of the core samples of marijuana taken from the sealed bags and boxes that had been seized from the defendants camper-trucks at the air strip on August 4, 1981. In

view of the court's ruling on the motion to suppress, no rulings will be made on the other motions unless the Government indicates to the court that this matter will proceed to trial as to some or all of the defendants and rulings are necessary.

FINDINGS OF FACT

In the early morning hours of August 4, 1981, at approximately 1:30 a.m., Customs Officer Scott Eshelman received a call at his home from an unidentified informant who told Eshelman that there was suspicious activity in the form of a plane landing and being met by a car at the Tucson Dragway, just east of Tucson. Eshelman then called the Pima County Sheriff's Department and asked that they dispatch a unit to investigate the report. At the Tucson Dragway the sheriff's department stopped and identified two of the defendants in this case, Gerald Johns and Dennis Hearron, as they were leaving the Tucson Dragway. The officers who stopped Johns and Hearron were unable to detect any criminal activity by the defendants and the men were released.

After receiving the information regarding suspicious activity at Tucson Dragway from the confidential informant and notifying the sheriff's department, Customs Officer Eshelman notified his superior, Customs Officer Dale Harper, of the information he had received. Officer Harper was on his way to the Dragway when he received a message that Johns and Hearron had been identified by the sheriff's department and released.

Officer Harper had been investigating Johns for some time in the past and had information which linked Johns and defendants Carlos Leon and Manuel

Duarte to a drug smuggling operation.[1] After receiving the information that Johns and Hearron had been stopped and identified, Harper decided to go to Leon's residence and establish surveillance. Upon arriving at Leon's house, Harper found no vehicles present. He then went to Duarte's residence and found Leon's truck and Duarte's truck parked in the yard. Both trucks were covered by camper shells. Harper established surveillance. Someone came out from Duarte's residence, got in Leon's truck and drove it around to the back of the house. Soon thereafter both trucks left and went to a nearby gasoline station. There they were met by an individual driving a yellow Volkswagen. All three vehicles returned to Duarte's residence and shortly thereafter the trucks left and proceeded towards Interstate 10, the major freeway which runs east-west through southern Arizona.

When the vehicles entered Interstate 10 and proceeded east Harper contacted other customs officers

[1] Harper had been in close contact with Agent Charles Schwarz of the Narcotics Unit of the Tucson Police Department. Schwarz had made available to Harper information that indicated Johns and Leon were involved in an international drug-smuggling operation. This information was based on personal observation of Johns' activities and an extensive phone toll analysis. The customs office had received information that Johns' aircraft had been in and out of the Sierra Vista Airport, located 15 miles from the international boundary, on numerous occasions and that the plane had been flown there by both Johns and Leon. Leon had been spotted by customs officers buying fuel in four 55 gallon drums at the Sierra Vista airport on several occasions. Harper also had personal information connecting Leon and Duarte. He had observed Leon go to Duarte's place of business and take Duarte's pickup truck to a C.B. Radio Shop. He was also aware of Duarte's prior drug conviction.

and had surveillance established on the trucks. The trucks traveled about 100 miles to a private airstrip near Bowie, Arizona. By this time the customs officers had established surveillance both on the ground and through the air.

Bowie, Arizona is a small rural town in southern Arizona some 50 miles from the Mexican border. The customs officers admit that at the time they established surveillance of the vehicles and followed them to Bowie they did not know the purpose of the vehicles trip. Shortly after the two trucks stopped at a picnic ground near the air strip two small planes landed on the strip. At this time the customs aircraft was circling 10,000 feet overhead and the ground surveillance unit was approaching the air strip. The customs officers later identified the planes that landed on the air strip as belonging to the defendants Johns and Hearron. However, the customs officers admit that they did not know where the planes had come from or what the planes might contain.

The ground surveillance unit consisted of Customs Officers Gerald Young and Scott Eshelman. The ground crew had followed the trucks to the Bowie airstrip and remained a short distance away. They could not see the activity at the Bowie airstrip but they were able to see the airplanes come in for landing and could see the planes as they were taking off. The ground unit was informed by the air unit that one of the trucks had met the first airplane that landed. They then received instructions from the air unit to investigate the trucks.

When the ground unit officers approached the trucks they were parked back to back under some trees. Officer Eshelman parked his car about thirty

yards from the trucks. He got out with his gun drawn, not to make an arrest, but for his own safety because of the remoteness of the area and the number of suspects. The defendants were in an area behind the trucks when the officers approached. Eshelman ordered the defendants to come out from behind the trucks and lie on the ground. When Eshelman first approached the area he noted that one of the defendants was throwing a blanket over the containers in the back of a truck and was closing the back of the truck. Officer Young approached the scene as Officer Eshelman was getting out of his car with his gun drawn. Officer Young asked Officer Eshelman to check the vehicles for the presence of other people. As Officer Eshelman approached the trucks he detected what he believed was the odor of marijuana. Officer Young testified he saw dark plastic wrapped around what appeared to be square packages or containers. He further testified that from his experience he knows that marijuana is commonly wrapped in this manner. Eshelman had proceeded to the truck with the closed back end and informed Young that there was marijuana in both trucks. All of the testimony indicates that what the officers saw at the airstrip were square boxes wrapped in dark plastic and sealed with tape. The plastic bags are common green trash bags.[2]

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[2] A dispute later arose as to what the officers actually saw. The hearing on the motion to suppress was held on November 9, and November 10, 1981. The government and the defendants presented all of their testimony and the matter was continued to December 4, 1981, for oral argument. The motion to suppress was argued by counsel on December 4. At the conclusion of the arguments the court took the matter under advisement and scheduled all further motions for

After securing the picnic area and viewing the sealed containers the officers handcuffed and arrested the defendants. They were read their *Miranda* rights

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hearing on December 11, 1981. The court at the December 4th hearing made some statements which indicated its disappointment that a warrant had not been obtained before opening the containers which had been seized by customs at the airstrip. From the court's statements it was clear that there was a good possibility that the motion to suppress might be granted because there had been no testimony that the customs officers had seen any marijuana when the contraband was seized nor were the contents of the containers readily ascertainable because of the shape or other characteristics of the containers which would put the contents "in plain view". The court indicated, as it now finds as fact, that sufficient facts had not been presented to convince the court that what the officers observed could have only been marijuana.

On December 11, 1981, the time scheduled for a hearing on the defendant's other motions, the government moved to reopen the hearing on the motion to suppress. The court granted the motion. Officer Eshelman then testified that after the arguments on the motion to suppress he had talked to Officer Young. Officer Young had explained that there was no evidence presented at the hearing of November 9-10, 1981 that marijuana was seen by the officers at the time the containers were seized and that the case might be lost because no search warrant was obtained before DEA opened the containers. After talking to Young, Eshelman went to the DEA Office and took some pictures of the bags which were allegedly already torn at the time they were seized. Eshelman testified that when he approached the trucks at the airstrip he lifted a blanket which was covering the containers and saw that several of the bags were torn and saw that the contents of several of the bags was a leafy green substance which he believed was marijuana.

On cross-examination Officer Eshelman admitted that none of the reports prepared by the Customs Service indicated that marijuana was visible at the time the containers were seized, that he did not recall ever telling the U.S. Attorney that

and advised they would be transported to the DEA Offices in Tucson, Arizona. After arresting the defendants, Officers Young and Eshelman went to the airstrip. At this point they spotted what they believed to be marijuana debris on the ground. The officers did not seize the debris nor test it. What the documentary evidence reveals is that the officers spotted some ambiguous small twigs which they believed were marijuana.

Several days after the containers had been secured at the DEA warehouse, the DEA officers opened the containers and took samples for testing. Subsequent tests proved that they contained marijuana. Counsel

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marijuana was visible at the time the containers were seized, that he attempted to take pictures of the torn bags showing the marijuana but they did not turn out, that the documentary evidence which was available to the court unequivocally illustrated that what the law enforcement officers seized at the airstrip were fully sealed boxes covered by opaque, sealed, green garbage bags commonly used in the home, and that he did not know when the bags were torn as shown in his subsequent pictures of the seized items taken at the DEA warehouse but that he knew his pictures were taken after the DEA had taken the core samples from the containers.

The officers' testimony regarding the sighting of marijuana at the time of the seizure is "suspect at best." This is not a simple case involving possession of a small amount of marijuana. It is obviously a case on which the government spent a great amount of time and money. The officers involved in the arrest are experienced law enforcement officers with many years of on-the-job experience, including the investigation of marijuana cases. It is difficult for the court to believe that in preparation for the hearing on the motion to suppress, the subject of whether marijuana was visible at the time of the seizure did not arise. The circumstances under which the testimony was finally presented makes it unreliable and the court cannot, in fairness to all parties, give the testimony of December 11 any weight.

have stipulated that no warrant was obtained before opening the containers.

After the two planes departed the Bowie airstrip they were followed to Tucson by the customs officers. Defendants Johns and Hearron were arrested in the Tucson area upon landing. The customs officers seized debris inside the plane of Johns which they believed was marijuana but subsequent testing of the substance proved that this was not correct.

CONCLUSIONS OF LAW

The question presented to the court is whether the warrantless search of the sealed boxes and bags found in the beds of the defendants' trucks at the Bowie airstrip was illegal, requiring the suppression of the evidence seized therefrom? In *Robbins v. California*, —— U.S. ——, 101 S.Ct. 2841 (1981), the Supreme Court held that the Fourth Amendment protects peoples' effects whether they are "personal" or "impersonal", that a closed, opaque container may not, as a general rule, be opened without a warrant even if found during the course of a lawful search of an automobile, and that the opening of closed containers which contained bricks of marijuana without a search warrant during the lawful search of an automobile violated the Fourth and Fourteenth Amendments of the United States Constitution.

The court finds the holding of *Robbins*, *supra*, controlling in the case at bar. If a defendant had a reasonable expectation of privacy in the articles seized from him by a law enforcement officer that officer must either obtain a warrant for the search of the item or in order to avoid obtaining a warrant bear the burden before a court of law to demonstrate that a warrant was not necessary because the circum-

stances of the case fall within one of the carefully delineated exceptions to the Fourth Amendment warrant requirement. In *Robbins, supra,* the Supreme Court makes clear that the nature of the container does not matter when making the determination as to what articles are entitled to Fourth Amendment protection. The only exception to this coverage is if the seized article could be one which could only contain contraband. As in *Robbins, supra,* the court is not convinced by the credible evidence presented that the seized containers could have only contained contraband.

Once it is established that a defendant has a reasonable expectation of privacy in the item seized a warrant must be obtained unless the government can establish that an exception to the warrant requirement is applicable. No exception to the warrant requirement was established in this case. Although smelling marijuana will give a law enforcement officer a right to legitimately search a vehicle and seize suspected contraband therefrom, *United States v. Garcia-Rodriguez,* 558 F.2d 956 (9th Cir. 1977) this information does not give law enforcement officers a right to search the item seized without first resorting to a neutral magistrate for obtaining a search warrant. *Robbins, supra; Sharpe v. United States,* 660 F.2d 967 (4th Cir. 1981); *United States v. Rivera,* 654 F.2d 1048 (5th Cir. 1981); *United States v. Dien,* 609 F.2d 1038 (2d Cir. 1979).

Neither the automobile exception nor the exigent circumstances exception to the warrant requirement are applicable in the present case. The defendants were arrested and the contraband secured at the DEA warehouse before the DEA officers decided to open and take marijuana samples from the bags

without receiving a warrant. Nor is the plain view exception to the warrant requirement applicable because the evidence presented convinces the court that the marijuana was not in plain view prior to the opening of the seized items.

The court's decision is mandated by the Supreme Court's ruling in *Robbins v. California, supra.* The government has attempted to distinguish the case at bar from *Robbins* in two ways. First, the government argues that the defendants cannot be given a reasonable expectation of privacy in numerous bags and boxes of marijuana. Secondly, the government contends, that even if the defendants do have a reasonable expectation of privacy in the contents of the seized items they cannot complain, under the facts and circumstances of this case, of the DEA's failure to obtain a warrant because the seized items could have only contained marijuana.

The government relies on *United States v. Gooch,* 603 F.2d 122 (10th Cir. 1979) for the proposition that when a cargo or numerous containers are seized the owners of the containers do not have a reasonable expectation of privacy in the seized items. In *Gooch,* the Tenth Circuit wrote, "We decline to read into the summary Supreme Court action in *Robbins* the implicit adoption of a per se rule that would hold a warrant required before any form of container or package found in a vehicle could be searched," 603 F.2d at 126. However, the later *Robbins* decision makes clear that a reasonable expectation of privacy can be held in other than personal effects: "[The Fourth] Amendment protects people and their effects, and it protects those effects whether they are 'personal' or 'impersonal' ". *Robbins, supra,* at 2846. The Supreme Court's reason for adopting a "bright line

rule", which the *Gooch* court refused in 1979 to read into the Supreme Court's action of summarily vacating the California Court of Appeals decision in *Robbins*, was to end confusion for law enforcement officers in their determination of when a warrant was required. As Justice Powell wrote in his concurring opinion:

> The plurality's "bright-line rule" would extend the warrant clause of the Fourth Amendment to every "closed, opaque container," without regard to size, shape or whether common experience would suggest that the owner was asserting a privacy interest in the contents. The plurality would exempt from the broad reach of its rule only those "closed, opaque containers" where, because of shape or other characteristic, the "contents may be said to be in plain view."

Robbins, supra, at 2847, footnote 1.

The defendants in this case manifested a reasonable expectation of privacy in the contents of their trucks. The trucks had camper shells over them and the windows of the camper shells were covered with an opaque cellophane which kept persons walking by the truck from being able to observe the contents of the bed of the truck. The trucks were either closed or the contents of the trucks had blankets thrown over them. Most important, the seized contents were either in cardboard boxes or in double, opaque, green bags that were sealed with a thick tape. These articles have been accorded a privacy expectation even when found in bulk. *Sharpe v. United States, supra*; *United States v. Rivera, supra*; *United States v. Pillo*, 522 F. Supp. 855 (M.D. Pa. 1981). The court finds, given all the facts and circumstances of the

case, and in accordance with *Robbins* and its progeny, that the defendants held a reasonable expectation of privacy in the contents of their trucks.

The government asserts that though the defendants may have a reasonable expectation of privacy in the contents of the trucks, under the circumstances of the case the seized boxes and bags fall within the exception noted in *Robbins*, that given their shape or characteristics the seized items could have only contained marijuana. In support of this contention the government points out that the customs officers who seized the contents of the trucks had been involved in similar drug arrests, had personal experience with these kinds of containers, had been participants in a surveillance operation which noted two planes landing near the trucks, and had personal knowledge that at least one of the individuals had been previously involved in illegal activity. Furthermore, the officers testified that they smelled marijuana in the area of the trucks shortly after apprehending the suspects. Given all these facts, the government contends the containers could have only contained marijuana.

The court is not convinced, given all the facts and circumstances of the case, that the officers had sufficient information to conclude that the containers could have only contained marijuana. Several incidents which occurred in the investigation of this matter illustrate the danger of the court's drawing the conclusion desired by the government. When the sheriff's department stopped Johns and Hearron in the early morning hours of August 4, 1981 it was because an informant had called a customs officer and told him that a plane and a car were meeting at the Tucson Dragway. Because customs had information that one of the persons who reportedly used the

Dragway was involved with drugs they went to the dragstrip, but the men were apparently not engaged in illegal activity. Later in the day, when these two men were again stopped after landing near Tucson, the officers seized what they testified they believed was marijuana. A subsequent chemical analysis revealed that this was not the case. Certainly, by looking at the bags and boxes seized at the air strip there is no way to determine that the seized items contained marijuana or for that matter any illegal substance. Neither the shape nor any other characteristic of the seized containers made their contents readily ascertainable. In short, the court has not been convinced by the evidence presented that an exception to the warrant requirement existed given the facts of the case. It would have been a simple matter for the DEA officers to apply to a neutral magistrate for the issuance of a warrant. Having failed to do so and having failed to convince the court that the facts excused them from so doing, it is the court's conclusion that the evidence seized from the defendants at the airstrip near Bowie must be suppressed.

IT IS ORDERED that the Motion to Suppress is granted as to all defendants except Johns and Hearron. Although these defendants joined in the Motion to Suppress, the record is silent as to their claimed interest in the suppressed evidence. If these two defendants desire to be heard further on this issue they should file legal memorandum as to their positions and notice the court for hearing.

DATED this 8th day of January, 1982.

/s/ Alfredo C. Marquez
ALFREDO C. MARQUEZ
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CR 81-188 TUC ACM

UNITED STATES OF AMERICA, PLAINTIFF

vs.

LYLE GERALD JOHNS, ET AL., DEFENDANTS

[Filed Feb. 3, 1983]

ORDER

This order and memorandum addresses the question of the defendants Johns and Hearron's standing to object to the introduction of illegally searched bags of marijuana. This Court's order of January 8, 1982 explains the facts and law upon which the court's original ruling is based. The Court suppressed the searched evidence as to five of the defendants but reserved ruling as to Johns and Hearron because the record was apparently silent as to these defendants claimed interest in the suppressed evidence. After a further hearing and oral argument it is the Court's ruling that Johns and Hearron have standing to object to the introduction of the illegally searched evidence and the Court's order of January 8, 1982, is applicable to them.

There are two grounds upon which standing is conferred upon the defendants. First, after a review of the record and the avowals made by the defendants, acquiesed [*sic*] to by the Government,[1] the court finds

[1] The government did not seriously contest any of the defendants standing at the Motion to Suppress. Only after the

Johns and Hearrons' position with regard to the totality of factors courts use to determine whether defendants have standing to object to constitutional violations is not in any meaningful way different from that of the other defendants in this case.

The evidence at the suppression hearing, in addition to that already enumerated in the Court's previous order, revealed that the persons who picked up the bags of marijuana at the air-strip were not to be paid for their participation until they delivered the marijuana to another destination. The defendants Johns and Hearron were identified by customs agents as the registered owners of the planes that were seen landing at the air-strip and were apprehended later in the same day while piloting those planes Johns and Hearron have made avowals to the Court, acquiesed [*sic*] to by the Government, that they were in a bailor/bailee relationship with the defendants who picked up the marijuana. Johns and Hearron avow that they were to drop the marijuana to the other defendants in Bowie and then were to have the marijuana returned to them at a later date. In *Rawlings v. Kentucky*, —— U.S. ——, 100 S.Ct. 2556 (1980), the Supreme Court evidently recognized the bailment relationship could be the kind of relationship to which an expectation of privacy could be accorded under proper circumstances. Looking at the totality of relevant factors the only factual difference between Johns and Hearron and the other defendants is that

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court's initial ruling and query regarding Johns and Hearron's standing did the government make any argument regarding these defendant's standing. For the effect of the Government's acquiescence to questions of fact regarding standing, see, *Steagald v. United States*, —— U.S. ——, 101 S.Ct. 1642, at 1646 (1981); *United States v. Anderson*, No. 80-1684 (9th Cir., decided December 14, 1981, at 6085, n. 4.

the former were not present or in possession of the evidence when it was seized but had left the scene moments earlier. The government does not contend that Johns and Hearron abandoned the bales or in any way lessened their interest or expectation of privacy in the seized items. Cases cited by the Government in their brief in opposition to Johns' and Hearron's standing are distinguishable. Accepting the defendant's assertions as true, the Court finds that all of the defendants have asserted a sufficient interest in the property and evinced identical expectations of privacy in the seized goods sufficient to confer standing to object to a constitutional violation of their seized property.[2]

A second, equally compelling reason for according Johns and Hearron standing was explained in *United States v. Rakas* [*sic*], 439 U.S. 128, 99 S.Ct. 241 (1978). In *Rakas, supra*, the United States Supreme Court held that the focus of the inquiry in a determination of a defendant's standing to object to the admission of illegally obtained evidence is whether the defendant's rights were personally violated by the allegedly illegal search or seizure. Under this view, regardless of Johns' and Hearron's right to contest the legality of the seizure, they do have a right to contest the legality of the search. In this case, it is not the seizure but the search which resulted in the illegality. Johns and Hearron have established they maintained an interest in the property and that interest was maintained through the time of the illegal search.

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[2] *See Robbins v. United States* [*sic*], *infra*, and this court's order of January 8, 1982 for the justification for the evidence seized in this case as being entitled to a "reasonable expectation of privacy" for Fourth Amendment and warrant requirement purposes.

Therefore, the court's findings of January 8, 1982 with regard to the reasonable expectation of privacy which was evinced by the property seized is equally applicable to Johns and Hearron. Their rights were personally violated when their property, which evinced objective indices of being entitled to a reasonable expectation of privacy, was illegally searched. Therefore they may object to the illegality.

The Government's motion to stay the order of January 8, 1982, until the Supreme Court reconsiders *Robbins v. United States* [*sic*], 453 U.S. ——, 101 S.Ct. 2841 (1981) in *United States v. Ross*, 655 F.2d 1159 (D.C. Cir. 1981), cert. granted 50 L.W. 3278, October 13, 1981 is denied.

Page 8, line 14 of the Court's order of January 8, 1982 is amended to reflect that suspected marijuana debris was found in the plane of Hearron as opposed to Johns.

IT IS SO ORDERED.

2/2/82

/s/ Alfredo C. Marquez
ALFREDO C. MARQUEZ
United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 82-1080
DC CR 81-0188-01)
81-0188-07) ACM

UNITED STATES OF AMERICA, PLAINTIFF/APPELLANT

vs.

LYLE GERALD JOHNS, DENNIS EUGENE HEARRON, MANUEL JESUS DUARTE, CARLOS TORRES LEON, JOSE OROS SOTO, ROBERTO LEON GOMEZ, and JOHN LIZARAGA REDMOND, DEFENDANTS/APPELLEES

Appeal from the United States District Court
for the District of Arizona (Tucson)

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Arizona (Tucson) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered June 10, 1983

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CA No. 82-1080

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

vs.

LYLE GERALD JOHNS, ET AL., DEFENDANTS-APPELLEES

[Filed Jan. 4, 1984]

ORDER

Before: TRASK, ANDERSON and CANBY, Circuit Judges

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for an en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

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NO. 83-1625

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

UNITED STATES OF AMERICA,

v.

LYLE GERALD JOHNS, ET AL.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

May packages which have been seized but not opened from pick-up trucks during a warrantless probable cause search, and immediately stored in a government warehouse, be searched without a warrant several days after their seizure?

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STATEMENT

In its Petition for a Writ of Certiorari, the government attempts to characterize the search below as no more than a routine automobile search which should be governed solely by the principles established by this Court in cases such as Chambers v. Maroney, 399 U.S. 42 (1970), Cooper v. California, 386 U.S. 58 (1967) and Carroll v. United States, 267 U.S. 132 (1925). A brief clarification of the facts set forth in the Petition will be helpful to the consideration of the government's argument.

After an investigation, Customs officers arrested Respondents Duarte, Gomez, Leon, Redmond and Soto at an airstrip located near a picnic area in a remote area of Arizona. Appendix to Petition (hereinafter App.) at 19a-22a. The officers had previously surveilled two small

airplanes landing on the airstrip. The planes were met by pick-up trucks with camper shells that were driven by the above-named respondents. Id. Both of the trucks were loaded with square boxes wrapped in dark plastic and sealed with tape. Id. at 20a. As the officers approached the trucks, they detected the odor of marijuana in the area. Id. at 20a, 27a. Contrary to the Petition, however, the officers never testified that the odor of marijuana emanated from the packages themselves. Compare Petition at 20.

The government strongly suggests, but does not argue, that the nature of the packages could not support a sufficiently reasonable expectation of privacy to trigger the warrant requirement. See Petition at 20. Both the trial court and the Court of Appeals rejected this plain

view argument. App. at 3a-6a, 26a-28a. The trial court rejected the plain view argument after finding that nothing about the shape or other characteristics of the packages made their contents readily ascertainable, id. at 27a-28a. The trial court also found that some of the testimony offered by the government about the nature of the packages was not credible, id. at 20a-22a, n.2. Surely, under these circumstances, any suggestion by the government that the packages did not manifest a reasonable expectation of privacy should be rejected.

After the arrests, the seized packages were transported to the Drug Enforcement Administration warehouse in Tucson, Arizona. Id. at 2a, 22a. Three days later, without obtaining a search warrant, federal agents opened the packages and took core samples of the contents. A labora-

tory analysis proved that the packages contained marijuana. Id.[1]

REASONS FOR DENYING THE PETITION

I. The decision by the Court of Appeals was correct.

a. General principles.

On the merits, the operative question is whether the search below was a package search which could therefore only be conducted under the authority of a warrant, see Arkansas v. Sanders, 442 U.S. 753 (1979) and United States v. Chadwick, 433 U.S. 1 (1977), or whether it was an automobile search and therefore permissible without a warrant. See United States

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[1]The government contends that the record does not support the three-day delay. Petition at 20-21, n.14. The government first made this contention in a Petition for Rehearing in the Court of Appeals. That Petition was denied. In this Court, however, the government does not contest the finding by the Court of Appeals that the search occurred three days after the seizure. Petition at 21, n.14.

v. Ross, 456 U.S. 798 (1982) and Carroll v. United States, 267 U.S. 132 (1925). A comparison of the rules governing automobile searches and those governing package searches will demonstrate that the ruling below was correct.

The starting point is in the analysis of the presumption in favor of warrants. All searches conducted without a warrant are per se unreasonable, subject only to a few specifically established and well-delineated exceptions. Mincey v. Arizona, 437 U.S. 385, 390 (1978); Katz v. United States, 389 U.S. 347, 357 (1967). If the government seeks to carve out a new exception, the government bears the burden of demonstrating why the situation is so unusual as to justify dispensing with the presumptive protection of a warrant. Mincey, supra at 391. The exceptions that have been created are generally no broader

than is necessitated by the circumstances that gave rise to the exception. Chambers v. Maroney, 399 U.S. 42, 61 (1970), Terry v. Ohio, 392 U.S. 1, 29 (1968), see United States v. Rabinowitz, 339 U.S. 56, 70 (1950) (Frankfurter, J., dissenting).

This general rule (that an exception to the search warrant requirement can be no broader than what is required by the exigencies that gave rise to it) has not been applied to automobile searches.[2] At first, warrantless searches of automobiles were permitted on the theory that automobiles are mobile and therefore it would be impracticable to obtain a warrant before

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[2]Only the warrantless searches of automobiles and the persons of arrestees appear to be exempt from the rule that exceptions to the Warrant Clause can be no broader than is necessitated by the circumstances that gave rise to the exception. See Texas v. Brown, ___U.S.___, 103 S.Ct. 1535, 1544, n.1 (1983) (Powell, J., concurring), United States v. Edwards, 415 U.S. 800 (1974).

the automobile moved to another jurisdiction. Coolidge v. New Hampshire, 403 U.S. 443, 459-60; Carroll v. United States, 267 U.S. at 153. Subsequently, however, warrantless searches of automobiles, based upon probable cause, were allowed long after the automobile had been secured or impounded at the police station. Texas v. White, 423 U.S. 67 (1975); Chambers v. Maroney, 399 U.S. 42 (1970). Clearly, the exigency that was created by the mobility of the automobile was not sufficient to justify those warrantless searches.

The searches were upheld because the Courts reasoned that people enjoy a lesser expectation of privacy in their automobiles and that a search warrant is therefore not required before an automobile can be searched. United States v. Chadwick, 433 U.S. at 12-13; Cardwell v.

Lewis, 417 U.S. 583, 590 (1974) (plurality opinion); Cady v. Dombrowski, 413 U.S. 433, 441 (1973). The lesser expectation of privacy is in part founded on the fact that automobiles seldom serve as the repository of personal effects. Cardwell v. Lewis, 417 U.S. at 590. Perhaps because automobiles do not serve as repositories for personal effects, there is no difference between seizing an automobile to conduct a subsequent search and immediately searching the automobile where it is found. United States v. Ross, 456 U.S. 798, 807, n.9; Chambers v. Maroney, 399 U.S. at 52. Either way, no search warrant is required. Id.

Packages, however, are different. The general rule that warrants are required prior to a search applies fully to packages. The Court has reasoned that, unlike automobiles, whose primary function

is transportation, packages usually serve as repositories for personal effects. Consequently, a person's expectation of privacy in a package is substantially greater than that in an automobile. United States v. Ross, 456 U.S. at 811, United States v. Chadwick, 433 U.S. at 13.

Accordingly, the Court has recognized a difference of constitutional dimension between temporarily seizing a package and actually searching the package by opening it and examining its contents. United States v. Place, ___U.S.___, 103 S.Ct. 2637, 2641 (1983); Texas v. Brown, ___U.S. __, 103 S.Ct. 1535, 1546 (1983); Walter v. United States, 447 U.S. 649, 654 (1980). Compare Chambers v. Maroney, United States v. Ross, supra (no such distinction is made for automobiles). Therefore, if police officers find a movable package in plain view and have probable cause to

believe it contains contraband, they may seize the package temporarily pending the issuance of a search warrant. Texas v. Brown, ___U.S. at ___, 103 S.Ct. at 1547 (Stevens, J., concurring in the judgment). This point is critical, unlike the rule that governs automobiles, the fact that the police are allowed to seize a package does not also allow them to search it without a warrant. United States v. Jacobsen, ___U.S.___, No. 82-1167 (April 2, 1984). Before a seized container may be searched, the police officers must obtain a warrant. As this Court stated in United States v. Chadwick, supra:

> In our view, when no exigency is shown to support the need for an immediate search, the Warrant Clause places the line at the point where the property to be searched comes under the exclusive dominion of police authority. Respondents were therefore entitled to the protection of the Warrant Clause with the evaluation of a neutral magistrate, before

> their privacy interests in the contents of the footlocker were invaded.

433 U.S. at 15-16.

The fact that the police have lawfully seized the package, however, does not entitle them to hold it indefinitely pending the issuance of a warrant. As Justice Stevens stated in Texas v. Brown, officers are only entitled to seize the package temporarily. 103 S.Ct. at 1547 (emphasis supplied). An analogous case is United States v. Place, ___U.S.___, 103 S.Ct. 2637 (1983). In Place, this Court held that a traveler's luggage, could be briefly detained, based on reasonable suspicion, to investigate the circumstances that aroused the suspicion. 103 S.Ct. at 2644 (emphasis supplied). In Place, a 90-minute detention of a traveler's luggage was deemed unreasonable. Id. at 2646.

b. The applicability of Ross.

The seemingly conflicting principles of Fourth Amendment law that apply to the searches of automobiles and packages converged in United States v. Ross, supra. In Ross, this Court held that if there is probable cause to search an automobile for contraband, the entire automobile, including any packages found in the automobile, may be searched without a warrant. 456 U.S. at 824. After noting that packages are presumptively protected by the Warrant Clause of the Fourth Amendment, the Court nevertheless held that packages could be searched without a warrant as part of a general automobile search. Various reasons were advanced for carving out this exception to the normal protection afforded packages. First, the Court recognized that persons' expectations of privacy, as protected by the Fourth Amendment, vary in

different settings. For example, the Court reasoned, the package carried at the time of arrest may be searched without a warrant regardless of the subjective expectation of privacy that the arrestee might have in the package. Id. at 823.

The Court also noted that a contrary rule would be unnecessarily inconsistent with the rationale supporting the automobile search. Id. at 822, n.28. If the police were prohibited from immediately opening a package found in an automobile, they would be forced to secure the automobile until a warrant could be obtained to open the package, as the police could never be sure that the contraband was not secreted in some yet undiscovered location in the automobile, thus delaying the release of the automobile if in fact no contraband were found. Id. Finally, it was noted that the rule

announced in Ross established a bright line between searches that must be conducted with a warrant and those which can be conducted without a warrant, giving much needed guidance to the police and courts. Id. at 825 (Blackmun, J., concurring); Id. at 826, (Powell, J., concurring).

In the instant case, the packages were not searched when the trucks were searched. Rather, the packages were removed from the trucks and securely placed in the D.E.A. warehouse in Tucson, Arizona. Three days later, without a warrant, they were opened and samples of the contents removed. The application of the above principles to the instant case will establish that the Court of Appeals was correct when it ruled that the packages could not be opened without a warrant.

Initially, it must be remembered that packages, unlike automobiles, cannot normally be searched without a warrant. United States v. Ross, United States v. Chadwick, United States v. Jacobsen, supra. This is because packages, unlike automobiles, are often repositories for personal effects. Ross, Chadwick, supra. Nevertheless, if a package is found in an automobile, and there is probable cause to search the automobile, the package may also be searched, without a warrant, as part of the automobile search. Simply stated, the fact that the package is found in an automobile creates an exception to the normal rule that a warrant is necessary to search the package.

This result is in part justified by analogizing automobile searches to searches incident to an arrest. If a person in possession of a package is arrested, that

package, even though it is normally protected by the Warrant Clause, may be searched incident to the arrest without the warrant. New York v. Belton, 458 U.S. 259 (1981). The analogy is well taken. Like automobiles, arrestees enjoy a lesser expectation of privacy in their persons. Mincey v. Arizona, 437 U.S. at 391; United States v. Edwards, 415 U.S. 800, 808-809 (1974). Consequently, an arrestee's person may be searched without a warrant long after his or her arrest and incarceration. United States v. Edwards, supra. Similarly, an automobile may be searched without a warrant long after it has been impounded by the police. Texas v. White, supra.

The application of the above principles does not dictate, however, that packages found on a person at the time of arrest may be searched long after they have been removed from the possession or control of

the arrestee. Nor should it follow that packages found in a car that is subject to search may be searched long after they have been removed from the car. Illustrative is United States v. Chadwick, supra.

When Chadwick was arrested, he was in the process of lifting his footlocker into the trunk of a car. 433 U.S. at 4. Presumably, the footlocker could have been seized and searched immediately pursuant to Chadwick's arrest. New York v. Belton, supra, Chimel v. California, 395 U.S. 752, 763 (1969). The arresting police officers, however, declined to exercise their right to conduct an immediate search of the footlocker and elected instead to transport it to the federal building where it was secured under the exclusive control of law enforcement authorities. Since the footlocker was no longer immediately

associated with the person of the arrestee, the reasons that would have allowed a warrantless search no longer applied and this Court held that a warrant had to be obtained before the footlocker could be searched. 433 U.S. at 15. Accord Preston v. United States, 376 U.S. 364 (1964).

In Ross, the sole reason the packages could be searched was that they were found in an automobile that was subject to a warrantless search. Similarly, the footlocker in Chadwick was subject to search at the time of arrest solely because it was in the possession or control of the person arrested. Once the police declined to exercise their right to conduct an immediate search, and elected instead to remove the footlocker to a law enforcement warehouse, the reasons that would have permitted an immediate search of the footlocker no longer existed.

The lesser expectation of privacy that society recognizes in an arrested person no longer applied to the footlocker. The presumptive protections of the Warrant Clause applied again. By the same reasoning, once the Customs agents in this case declined to exercise the right to search the packages as part of the automobile search and elected instead to store the packages at the D.E.A. warehouse for several days, no right to conduct a warrantless search existed. When the packages were in the exclusive control of the D.E.A., there was no longer the critical nexus between the trucks and the packages. The lesser expectation of privacy that society recognizes in automobiles no longer applied to the packages. The Warrant Clause of the Fourth Amendment once again demanded that the officers obtain a warrant before the packages could

be searched. United States v. Chadwick, 433 U.S. at 13, 15-16.

The other reasons advanced by the Ross court in support of warrantless package searches also do not apply here. The Ross court noted that requiring a warrant to search a package found in an automobile would unnecessarily delay the search of the automobile, thus undercutting the rationale of Carroll and Chambers, which authorize the immediate search of an automobile. In this case, the search of the packages was delayed by the action of law enforcement officers for three days. Certainly, if the officers had obtained a warrant to search those packages during the three days, the search of the trucks would not have been further delayed. The rationale of Carroll and Chambers simply does not apply here.

Another virtue of Ross is that it gives

police and courts a bright and clear rule about when packages may be searched without a warrant. There is no brighter and clearer rule in Fourth Amendment jurisprudence, however, than the rule that all searches conducted without a warrant are per se unreasonable. Mincey v. Arizona, 437 U.S. at 390; Katz v. United States, 389 U.S. at 357. Any exception to this first rule of Fourth Amendment jurisprudence should be no broader than the circumstances that give rise to it. Chambers v. Maroney, 399 U.S. at 61; Terry v. Ohio, 392 U.S. at 29; United States v. Rabinowitz, 399 U.S. at 70 (Frankfurter, J., dissenting).

In this case, the reasons that justify the warrantless search of a package found during the course of a legal automobile search certainly do not justify a search of the package three days after it has

been stored in a law enforcement warehouse. Consequently, the Ross exception should not be extended to govern the instant situation. Chambers v. Maroney, 399 U.S. at 61, Terry v. Ohio, 392 U.S. at 29, United States v. Rabinowitz, 399 U.S. at 70 (Frankfurter, J., dissenting), supra. The government has not been able to demonstrate why this situation is so unique to justify dispensing with the protection of a warrant. Mincey v. Arizona, 437 U.S. at 391. Consequently, the only bright line rule that the police should be instructed to follow in a situation such as this is that, absent exigent circumstances, they must obtain a warrant before opening the package. See United States v. Chadwick, 433 U.S. at 13, 15-16.

c. Other reasons that support the decision by the Court of Appeals.

Packages are not normally seized because they, in and of themselves, are contraband or evidence of a crime. Rather, they are seized because it is believed that they contain contraband or evidence. It is clear that without a warrant, such packages can be temporarily seized in anticipation of obtaining a warrant. Texas v. Brown, ___U.S.___, 103 S.Ct. at 1547 (Stevens, J., concurring in the judgment). They can only be temporarily seized, however, because to secure them for an unreasonable period of time without examining the contents would undoubtedly violate the Fourth Amendment. Cf. United States v. Place, ___U.S.___ at __, 103 S.Ct. at 2647 (a 90-minute detention, based on reasonable suspicion,

of a traveler's luggage was unreasonably long).

In this case, had the police searched the packages immediately and found that they contained innocent items, the packages could have been immediately returned to the respondents and no unconstitutional seizure would have occurred. Texas v. Brown, (Stevens, J., concurring in the judgment), United States v. Place, supra. If the 90-minute delay in Place was deemed unreasonable because this Court reasoned that the investigation of the luggage should not have taken so long, certainly the three-day period in this case was far longer than what was necessary to obtain a warrant. The three-day delay was an unnecessary invasion of a person's right to possession of packages. United States v. Place, supra.

Nonetheless, the government argues that

since the packages could have been searched when they were seized at the Bowie airstrip, the respondents had no recognizable expectation of privacy that the contents would remain secret in the future. In support of this proposition, the government cites Illinois v. Andreas, __U.S.___, 103 S.Ct. 3319 (1983) and United States v. Edwards, 415 U.S. 800 (1974). Neither case supports the government's argument.

In Illinois v. Andreas, a container arriving from Calcutta, India was searched by a Customs inspector at O'Hare International Airport. Contraband was found within the container. A controlled delivery was then made to Andreas' apartment. A few minutes later, when Andreas attempted to leave the apartment with the container, he was arrested. Id. at 3322. The container was taken to the police station

where it was opened without a warrant. Id. As the container had already been legally opened by the government during the Customs search, this Court held that Andreas did not have any expectation of privacy that the container would not again be opened by police officers at the police station. Id. at 3324-25. Unlike the situation in Andreas, the instant packages were opened for the first time after the packages had been stored in the D.E.A. warehouse for three days. Clearly therefore, Andreas does not apply to the instant situation.

United States v. Edwards does not help the government either. In Edwards, this Court upheld the warrantless seizure of a suspect's clothing several hours after he had been arrested and jailed. 415 U.S. at 808-09. Edwards does not support the government's argument because, like auto-

mobiles, arrestees have lesser expectations of privacy in their persons. Mincey v. Arizona, 437 U.S. at 391. Consequently, an arrestee's person and his clothing can be searched without a warrant. There is no such lesser expectation of privacy in packages. Consequently, Chadwick, discussed above, is much more applicable to the instant situation than is Edwards.

While the cases cited by the government do not support its argument, the rationale of other decisions of this Court support the decision of the Court of Appeals. See Michigan v. Tyler, 436 U.S. 499 (1978), United States v. Chadwick, 433 U.S. 1 (1977) (discussed above), G.M. Leasing Corp. v. United States, 429 U.S. 338 (1977), Preston v. United States, 376 U.S. 364 (1964).

For example, in Michigan v. Tyler this Court held that after extinguishing a fire

in a building, officials may remain in the building for a reasonable time to investigate the cause of the fire. No warrant is necessary for this investigation. 436 U.S. at 510. The fact that a warrantless investigation is immediately permissible, however, does not give officials the right to return to the building days later to conduct the inspection. If the inspection is to be conducted days after the exigency of the fire has ended, the officials must obtain a warrant before the building can be entered. Id. at ___. Accord Michigan v. Clifford, ___U.S.___, 104 S.Ct. 641, 648-49 (1984) (plurality opinion). Clearly, the principle that the officials could immediately inspect the building did not result in a diminished expectation of privacy days later when the officials sought to conduct a subsequent inspection.

In G.M. Leasing Corp., supra, the

evidence showed that law enforcement officials could have entered a building without a warrant because exigent circumstances were present. 429 U.S. at 361-62 (Burger, C.J., concurring). Rather than acting immediately, however, the agents chose to wait two days before entering the building. Id. This Court held that the agents' delay prohibited them from entering the building without a warrant. Id., 429 U.S. at 358. Like the defendants in Chadwick, Preston, Tyler and Clifford, the defendant had a diminished expectation of privacy in his building when law enforcement officers were immediately entitled to search the building without a warrant. When the officers instead elected to delay the search, the diminished expectation of privacy did not continue. Rather, the presumptive protection of the Warrant Clause once again asserted itself and a

warrant became necessary before the building could be entered. The common thread in all these cases is that police were no longer allowed to search without a warrant when delay had undercut the reasons that initially would have allowed such a search. Any diminished expectation of privacy that was created by an exception to the warrant requirement was coterminous with the reasons that gave rise to the exception.

Similarly, in this case, the respondents undoubtedly had a diminished expectation of privacy in their packages when the officers were entitled to search the packages, without a warrant, as part of an automobile search. When the officers elected not to search the packages, however, and instead transported them to the D.E.A. warehouse in Tucson, the respondents' expectation of privacy in

their packages was no longer diminished. Rather, as in the above cases, the Warrant Clause again demanded that the officers obtain a warrant before inspecting the packages. Again, a warrant was required because the delay had undercut the reasons which initially would have allowed a warrantless search.

The balance of the cases cited by the government simply do not apply to the instant situation. Virtually all of those cases involve the searches of automobiles. For various reasons, this Court has allowed the searches of automobiles long after they have been immobilized by impoundment at a law enforcement warehouse. See e.g., Cooper v. California, 386 U.S. 58 (1967), Cady v. Dombrowski, 413 U.S. 433 (1973), Cardwell v. Lewis, 417 U.S. 583 (1974), South Dakota v. Opperman, 428 U.S. 364 (1976). None of

these cases involved the searches of packages days after the packages had been removed from automobiles. Consequently, for the reasons discussed above, none of these cases are applicable to the instant situation.

II. Additional reasons that the Court should deny the Petition.

In addition to the merits of the issue presented, respondents offer the following additional reasons that this Court should deny the Petition.

a. The decision below is not in conflict with the decisions of other circuits.

Petitioner argues to this Court that the decision below is in conflict with United States v. Rivera, 684 F.2d 308 (5th Cir. 1982), United States v. Schecter, 717 F.2d 864 (3rd Cir., 1983), and Sharp v. United States, 712 F.2d 65 (4th Cir. 1983). An examination of those cases, however, reveals no such conflict.

United States v. Schecter, supra, did not even involve the search of a package. Consequently, it cannot be in conflict with the decision below. In both United

States v. Rivera, supra, and Sharp v. United States, supra, searches of packages found in automobiles were conducted about two days after the packages had been removed from automobiles. In neither case, however, was the issue presented in this case ruled on. Rather, in Rivera and Sharp, the litigants never argued that the delay in opening the packages rendered the automobile exception inapplicable. Therefore, the conflict asserted by the government does not, in fact, exist.

In order to consider a conflict between decisions of courts of appeals as a reason for granting a petition, this Court ordinarily requires a square and irreconcilable conflict between the lower courts. See, e.g., Avco Corp. v. Aero Lodge 735, 390 U.S. 557, 559 (1968); Northeastern National Bank v. United States, 387 U.S. 213, 217 (1967). It has been suggested

that a conflict in decisions between various circuits should be relied upon as a ground for certiorari only in instances where it is clear that the conflict is evident and that it can be effectively resolved only by the prompt action of this Court alone. Mr. Justice Harlan, Some Aspects of the Judicial Process in the Supreme Court of the United States, 33 Australian L.J. 109 (1959).

No such irreconcilable conflict exists here, since the circuit courts cited by Petitioner have not even addressed the issue upon which the lower court decision was based in this case.

b. The decision in this case is not one which is likely to affect a significant number of future cases.

In determining whether or not to grant a given petition, this Court has always considered of paramount importance whether

or not the decision of the lower court will have a significant impact on future cases. See Stern and Gressman, Supreme Court Practice, §4.11, pp.284-285 (1978). The concept of importance relates, of course, to the importance of the issues "to the public as distinguished from" importance to the particular "parties" involved. Layne & Bowler Corp. v. Western Well Works, 261 U.S. 387, 393 (1923); Rice v. Sioux City Cemetary, 349 U.S. 70, 79 (1955).

The facts which give rise to this case are not facts which should recur to any significant extent. In most cases where officers arrest suspects in situations akin to this one, they will have a clear right to search packages found in an automobile at the scene. This right, in most contexts, is derived from several well-established constitutional prece-

dents.

In United States v. Ross, 456 U.S. 798 (1982), this Court approved of an immediate search of items resting in an automobile pursuant to the "automobile exception" to the warrant requirement. Likewise, in future cases, where immediate searches are conducted with probable cause at the time of the seizure of the automobile, there will be no difficulty in lower courts applying the Ross doctrine so as to validate the searches.

Additionally, in jurisdictions which allow inventory searches upon the seizure of a vehicle, subsequent warrantless searches of packages can be upheld based on the inventory search rationale approved by this Court in Illinois v. Andreas, ___ U.S.___, 103 S.Ct. 3319 (1983). The "inventory search" rationale was never argued in this case as a rationale for the

government's warrantless search of the packages, either before the District Court or the circuit Court of Appeals.

Finally, in many cases where warrantless searches of packages found in an automobile are made subsequent to lawful arrests, warrantless package searches can be justified as incident to the arrest of those persons taken into custody. See, e.g., New York v. Belton, 458 U.S. 259 (1981).

The issue presented for decision before this Court is not likely to recur with any frequency. Given the clear justifications which will usually allow police officers to search packages found in an automobile at the scene of an arrest, delays of the length which existed in this case will be rare. Consequently, a decision by this Court, given the peculiar circumstances of this case, will not have any overriding

impact on the system.

CONCLUSION

There are various reasons the Petition should be denied. First, the decision of the Court of Appeals was correct on the merits. All searches conducted without a warrant are per se unreasonable, subject to only a few limited exceptions. Generally, the exceptions are no broader than is necessitated by the circumstances that gave rise to the exceptions. For example, after extinguishing a fire, authorities are allowed to remain on the premises without a warrant to investigate the cause of the fire, and to ensure that it does not reignite. If the investigation is delayed, however, and the authorities seek to investigate the cause days later, a warrant is needed. Only when the authorities are searching automobiles and the persons of arrestees may the search be

conducted without a warrant even after it would be practicable to get one. This is because there is lesser expectation of privacy in the persons of arrestees and in automobiles.

No such lesser expectation of privacy exists in packages. Consequently, any exception to the warrant requirement that allows the warrantless search of packages should be no broader than the circumstances that gave rise to the exception. Packages may be searched without a warrant when they are found in an automobile that is subject to warrantless search. This is allowed to facilitate the search of automobiles for which no warrant is needed. If, however, a package found in an automobile is not searched as part of the automobile search, but instead is secured for several days in a government warehouse, the reasons for allowing a

warrantless search no longer apply. The reasons for allowing a warrantless search of the automobile will not be advanced by allowing a warrantless search of the package. Consequently, a warrant should be required before the package can be opened. For the above reasons, it is submitted that the decision of the Court of Appeals was correct and should not be disturbed by this Court.

The Petition should also be denied because the decision below is not in conflict with the decisions of other circuits of the Court of Appeals.

Finally, and perhaps most importantly, the decision below should not have a significant impact on future cases. In similar factual situations, the police will be able to search the packages without a warrant pursuant to other exceptions to the Warrant Clause. Factual situations

similar to the instant one are unlikely to recur with frequency.

For all of the above reasons, it is respectfully requested that the Petition be denied.

RESPECTFULLY SUBMITTED this 29th day of May, 1984.

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No. 83-1625

In the Supreme Court of the United States

OCTOBER TERM, 1984

UNITED STATES OF AMERICA, PETITIONER

v.

LYLE GERALD JOHNS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the warrantless probable cause search of bales of marijuana discovered in two pickup trucks, which would have been lawful if undertaken at the scene of the seizure or "soon" after the bales had been taken to the station house, was rendered unlawful by the passage of several days between seizure and search.

PARTIES TO THE PROCEEDING

In addition to the named respondent, Manuel Jesus Duarte, Roberto Leon Gomez, Dennis Eugene Hearron, Carlos Torres Leon, John Lizaraga Redmond, and Jose Oros Soto were defendants in the district court and are respondents here.

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 707 F.2d 1093. The district court's opinion (Pet. App. 16a-28a) and its supplemental order and memorandum (Pet. App. 29a-32a) are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 33a) was entered on June 10, 1983. A petition for rehearing was denied on January 4, 1984 (see Pet.

App. 34a). On February 27, 1984, Justice Rehnquist extended the time in which to file a petition for a writ of certiorari to and including April 3, 1984. The petition was filed on that date and was granted on June 18, 1984. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no Warrants shall issue, but on probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT

On September 1, 1981, a grand jury sitting in the District of Arizona returned a two-count indictment charging respondents with conspiracy to possess marijuana with intent to distribute it, in violation of 21 U.S.C. 846, and possession of marijuana with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). Prior to trial, the district court granted respondents' motion to suppress the marijuana that was the basis of the prosecution, and the government appealed pursuant to 18 U.S.C. 3731. The court of appeals affirmed the order suppressing evidence.

1. At approximately 1:30 a.m. on August 4, 1981, United States Customs Officer Scott Eshelman received a report from an unidentified informant of suspicious activity at the Tucson Dragway, located

outside of Tucson, Arizona. The informant related that an airplane had landed at the Dragway and had been met by a car. Customs officials contacted the County Sheriff's Department and requested that the car be intercepted. The vehicle was stopped as it was leaving the scene. No criminal activity was detected, but the occupants of the vehicle were identified as respondents Johns and Hearron. The two men were allowed to proceed on their way. This information was then relayed back to Officer Eshelman's superior, Customs Officer Dale Harper. Harper had been investigating Johns for some time and had information linking him with respondents Leon and Duarte in an international drug smuggling operation. Pet. App. 2a, 17a-18a.

Based on the available information, Officer Harper decided to initiate surveillance at Leon's residence. Finding no vehicles at that location, Harper moved on to Duarte's residence, where he observed and then followed pickup trucks belonging to Leon and Duarte. After meeting a third vehicle at a nearby gasoline station, the two pickups proceeded east on Interstate Highway 10. Officer Harper contacted other Customs officers, who maintained ground and air surveillance of the two trucks as they traveled 100 miles to a private airstrip near Bowie, a small town located about 50 miles from the Mexican border. Pet. App. 2a, 18a-19a.

Shortly after the trucks arrived at the airstrip, the first of two small planes, which were later identified as belonging to respondents Johns and Hearron, landed. The agents on the ground were unable to see what transpired from their vantage point, but their counterparts in the air informed them that one of the pickup trucks had approached the first plane.

That plane ultimately departed, after which the second small plane also landed and later departed. As the Customs officers on the ground approached the trucks to investigate, they detected the odor of marijuana. An officer saw one of the respondents throwing a blanket over the contents of one of the trucks. In the trucks the officers found some 40 square packages wrapped in plastic and dark green trash bags secured with tape.[1] Pet. App. 2a, 19a-20a; 11/9/81 Tr. 134; 12/11/81 Tr. 35.

Respondents Duarte, Leon, Gomez, Redmond and Soto were arrested on the ground at the airstrip. Before leaving the scene, the officers noticed some loose vegetable matter on the ground that they believed to be marijuana. Meanwhile, the two small planes were followed back to the vicinity of Tucson by Customs officers in the surveillance airplane. Respondents Hearron and Johns, the pilots, were arrested upon landing. Pet. App. 2a, 21a-23a.

The packages and bags found in the two pickup trucks were transported to a Drug Enforcement Administration warehouse in Tucson. Subsequently—"[s]everal days" later by the district court's description (Pet. App. 22a), three days later according to

[1] One of the officers, described by the district court as an "experienced law enforcement officer[] with many years of on-the-job experience, including the investigation of marijuana cases" (Pet. App. 22a n.2), testified, based upon his experience, that marijuana is commonly packaged in this manner (*id.* 20a).

At a supplementary hearing on the motion to suppress, one of the Customs officers testified, for the first time, that several of the bags in which the marijuana was found were torn in spots and that the contents of the bags, which appeared to be marijuana, were visible. The district court declined to credit this additional testimony (Pet. App. 21a-22a n.2).

the court of appeals (*id.* at 2a, 9a)—DEA agents took core samples from some of the bales.[2] The samples were sent for laboratory analysis and proved to be marijuana. No search warrant was secured at any time during this sequence of events. Pet. App. 2a, 22a.

2. All respondents moved to suppress the contraband, claiming that the warrantless search of the bales of marijuana violated their Fourth Amendment rights. Following an evidentiary hearing, the district court granted the suppression motion (Pet. App. 16a-28a). Relying on *Robbins* v. *California*, 453

[2] We do not believe that the record provides any support for these descriptions of the timing of the taking of core samples. The timing of the completion of the search of the bales simply was not the focus of any particular controversy in the district court (or in the court of appeals, at least until after the court of appeals had rendered its decision), see pages 6-7, *infra*, and the district court undoubtedly did not intend to make a precise finding of fact on this point. The only evidence of which we are aware that bears on the timing issue indicates that the core samples were taken the day after the seizure (12/11/81 Tr. 61). In the court of appeals the government's brief stated (at 6) that the interval was one day. Respondents Duarte, Leon, Soto, Gomez and Redmond asserted (Br. 3), however, that there had been a lapse of three days. But the stipulation reflected at the transcript pages cited in support of their assertion (11/9/81 Tr. 5) simply does not address the timing of the station house search. And when we observed in our petition for rehearing (at 5) that the court of appeals' statement based upon respondents' assertion had no foundation in the record, respondents were unable to adduce any record support therefor. See Opp. to Pet. for Rh'g 1-5. (The court of appeals nevertheless denied rehearing.) We do not ask this Court to review the court of appeals' factual assumption regarding the timing of the core sampling, but instead assume for purposes of this brief that the interval between seizure and search was three days.

U.S. 420 (1981), the court held that the insubstantial nature of the containers searched did not justify dispensing with a warrant (Pet. App. 23a-27a). The district court also refused to apply the automobile exception to the warrant requirement on the ground that "[t]he defendants were arrested and the contraband secured at the DEA warehouse" before the search of the bags was carried out (*id.* at 24a). Finally, the district court declined to recognize a "plain odor" exception to the warrant requirement (*ibid.*) and found the evidence insufficient to establish that the plastic-wrapped bales "could have only contained marijuana" (*id.* at 27a-28a).[3]

3. While this case was pending on the government's appeal, this Court decided *United States* v. *Ross*, 456 U.S. 798 (1982), and, in the process, overruled *Robbins* v. *California*, *supra*, upon which the district court had relied. *Ross* held that the automobile search exception to the warrant requirement permits the warrantless examination of the contents of a container found in a vehicle search conducted upon probable cause, provided that the container is one that might reasonably contain the object of the

[3] The district court initially found that respondents Johns and Hearron, the pilots who had delivered the marijuana and departed from the Bowie airstrip prior to its seizure, had not established any "interest in the suppressed evidence" (Pet. App. 28a) and accordingly lacked standing to seek suppression. But, responding to the district court's invitation to supplement their showing in this regard, Johns and Hearron argued that they had made a bailment of the marijuana and retained rights therein sufficient to permit them to challenge the search of the bags. Although these assertions, if credited, would seem to suggest that the other five respondents lacked "standing," the district court simply revised its suppression order to benefit all respondents (Pet. App. 29a-32a).

search. The parties submitted supplemental memoranda to the court of appeals addressing the significance of *Ross* for this case. Respondents argued that *Ross* should not be applied here because the search at issue antedated the decision in that case. In addition, respondents claimed that probable cause in this case had focused exclusively upon the plastic wrapped bales and did not extend to the pickup trucks, so that this case would be controlled by *United States* v. *Chadwick*, 433 U.S. 1 (1977), and *Arkansas* v. *Sanders*, 442 U.S. 753 (1979), rather than *Ross*.

While it rejected respondents' arguments respecting the application of *Ross*, the court of appeals nevertheless affirmed the suppression order (Pet. App. 1a-15a).[4] The court concluded initially that because *Ross* establishes that warrantless container searches subject to the automobile search doctrine are *not* unlawful, and no legitimate reliance interest would be undercut by its application, *Ross* is fully applicable to searches antedating its decision (Pet. App. 6a-8a). Second, the court of appeals determined that the focus of the officers' suspicion was not exclusively upon the plastic-wrapped bales. Emphasizing that the law enforcement officers were unable to see the transfer of the bales from the airplane to the pickup trucks, and that the officers did not know the nature and packaging of the contrabrand transferred before arriving on the scene, the court explained (*id.* at 8a-9a) that "it was not obvious that all the contraband would be in the bales. The [respondents] could have easily secreted other drugs elsewhere in the vehicles."

[4] The court of appeals upheld the district court's ruling according "standing" to the pilots, respondents Johns and Hearron (Pet. App. 13a-15a).

The court of appeals acknowledged, moreover, that "[t]he officers had probable cause to search both [pickup] trucks" and that, "[u]nder *Ross*, they also could have opened the packages [without a warrant] as part of that search" even after the packages had been secured at the DEA warehouse (Pet. App. 9a, 13a). Nevertheless, the court held that the taking of core samples from the bags without a warrant was unlawful because of the time that had passed between the seizure of the bags and the ensuing search (see pages 4-5 & note 2, *supra*). The court relied primarily on cases holding that the search-incident-to-arrest doctrine does not permit a warrantless search of property seized from an arrested suspect after the arrest encounter is completed (Pet. App. 9a-11a). The court also relied (*id.* at 11a, 13a) upon the characterization in *Ross*, 456 U.S. at 807 n.9, of *Chambers* v. *Maroney*, 399 U.S. 42, 52 (1970), as extending the automobile search exception to station house searches conducted "soon" after a seizure. The court reasoned that the practical difficulties of guarding an automobile stopped on the highway and the possible dangers of an on-the-spot search—which it believed to be the basis for this extension—"do not apply to a container that may be removed from the vehicle and secured by the police" (Pet. App. 12a).

The court of appeals observed that *Ross* had not overruled *Chadwick* or *Sanders*, and that those cases require that a warrant be obtained to conduct a probable cause search of a container not subject to the automobile search doctrine. The court accordingly concluded that *Ross* did not justify a warrantless search of "containers no longer in an automobile and secured by the police for three days" prior to the search (Pet. App. 12a). The bases for the auto-

mobile warrant exception—described as the inherent mobility of automobiles and the impracticability of securing a warrant in cases involving the transportation of contraband—do not apply in these circumstances, the court of appeals reasoned (*id.* at 13a, 15a). Nor did the court of appeals believe that *Ross* "so destroys the expectation of privacy in a container subject to an automobile search that the container is thereafter subject to search without a warrant" (Pet. App. 12a). The court concluded that because the officers "could have easily obtained a warrant" (*id.* at 13a) during the three days between seizure and search, their failure to do so rendered the search unlawful.

The court of appeals also rejected the government's alternative contention that the plain odor of marijuana emanating from the plastic-wrapped bales made it unnecessary to obtain a warrant prior to the search of the packages (Pet. App. 3a-6a). The court of appeals acknowledged the contrary decision of the Fourth Circuit in *United States* v. *Haley*, 669 F.2d 201, 203-204 & n.3, cert. denied, 457 U.S. 1117 (1982), but held that the odor provided no more than probable cause and that the parcels "did not announce their contents with sufficient clarity to eliminate the need for a warrant" under the exception to the warrant requirement recognized in *Arkansas* v. *Sanders*, 442 U.S. at 764-765 n.13 (Pet. App. 4a-5a & n.2).

INTRODUCTION AND SUMMARY OF ARGUMENT

This is a case in which law enforcement officers lawfully seized two pickup trucks at a remote airstrip near the Mexican border after observing a clandestine nighttime rendezvous between the trucks and two small aircraft. The initial, concededly law-

ful, search of the trucks disclosed that they contained some 40 bales—the apparent source of the distinct odor of marijuana detected by the officers as they approached the trucks. The court of appeals acknowledged that the officers could lawfully have opened the bales on the spot without a warrant, even though all suspects on the scene had been arrested, the trucks were in the custody of the agents, and there was no longer any substantial risk that the bales could be removed or destroyed in the time that would be required to procure a search warrant. Similarly, the court of appeals indicated that it would have upheld a search of the bales if conducted immediately upon their arrival at the law enforcement facility at which they were secured. However, no doubt in large part because the officers already knew (as well as anything can be "known") what the bales contained, they did not go through the empty formality of opening the bales at that time. Several days later, however, they extracted core samples of the substance contained in the bales and sent them to a laboratory for chemical analysis. Because of the delay in undertaking this action to complete the search, the court of appeals held that a warrant was required and suppressed the marijuana as evidence.

A. This case is controlled by *United States* v. *Ross*, 456 U.S. 798 (1982), and by this Court's decisions recognizing an automobile search exception to the warrant requirement. In *Ross* the Court held that the automobile search doctrine authorizes warrantless examination of any container found inside a vehicle in which the object of a probable cause search of the vehicle may be found. And in an unbroken line of decisions beginning with *Chambers* v. *Maroney*, 399 U.S. 42 (1970), the Court has made clear that so long as searching officers possess prob-

able cause supporting a warrantless auto search at the time a vehicle is seized, the warrantless search may be completed later, notwithstanding the passage of time, the intervention of other law enforcement procedures between the initial seizure and completion of the search, or the fact that the search is conducted in secure law enforcement offices rather than at the scene of the seizure. The justification for these decisions, briefly put, is simply that the "probable cause factor"—the essential predicate for a warrantless automobile search—"still obtain[s]" regardless of those intervening developments. *Chambers* v. *Maroney*, 399 U.S. at 52.

The considerations that led the Court to uphold warrantless automobile searches even though conducted at the station house rather than at the time and place of the seizure are fully applicable notwithstanding any delay in completion of an automobile search. That is, given the scope of the initial intrusion effected by seizure of a motor vehicle, a requirement that station house automobile searches be undertaken immediately would not provide any significant protection for privacy interests. At the same time, such a requirement would penalize law enforcement authorities for attending to competing responsibilities that may make immediate completion of a search infeasible and would thrust upon the courts the burdensome task of assessing, case by case, whether there was sufficient justification for interrupting or postponing a search. Such an approach would needlessly impair the clarity of the bright-line rule established in *Ross* and the automobile search cases.

B. *Ross* holds that the scope of the warrantless search authorized under the automobile exception is

commensurate with that which a magistrate could have authorized based upon the available probable cause. 456 U.S. at 823, 825. It is plain that several days' interruption in a warrant search of an automobile would not require officers to obtain a new warrant in order to complete the examination of suspicious containers found within the automobile. The "hypothetical warrant" reasoning of *Ross* thus confirms that a three-day delay in conducting or completing a probable cause search of a vehicle or containers found therein does not create the need to obtain a warrant.

C. Contrary to the view of other courts of appeals, which have understood *Ross* and *Chambers* to be controlling in circumstances such as those presented here, the court below believed that automobile search principles are inapplicable to delayed searches of containers that have been removed from the vehicle and secured in government custody. The distinctions perceived by the court of appeals are, however, insubstantial in light of the pertinent decisions of this Court.

The physical separation of the bales from the trucks is a wholly illusory ground of distinction. It is commonplace—especially in searches for illegal drugs—that containers believed to harbor contraband will be removed from a vehicle in the course of completing a search. But under this Court's decisions the physical location of a container at the time of search does not govern the applicability of the automobile search doctrine. Rather, the question is whether the probable cause that supports a search is directed at the outset to the vehicle or to the container alone. Nor is it relevant that the bales of marijuana were impounded here in a secure government facility. The Court directly rejected any such distinction in *Michigan* v. *Thomas*, 458 U.S. 259 (1982), and again, only last Term, in *Florida* v. *Meyers*, No. 83-1279 (Apr. 23, 1984).

The passage of time between the inception of the seizure and the completion of the search does not have any more significance here, where the inspection of a container is undertaken on a auto search rationale, than it does in auto search cases generally. Neither respondents nor the court of appeals has explained how any legitimate expectation of privacy entitled to the protection of a warrant requirement can arise simply by virtue of a few days delay in completing the search of a container. Quite the contrary seems true: the delay in execution of the search of seized items protects privacy interests by affording a pre-search opportunity to secure return of the property where probable cause is lacking. Fed. R. Crim. P. 41(e).

Moreover, any suggestion that such a revival of privacy expectations should be recognized would be inconsistent with the facts of this case. The delay in completing the search here was almost surely due in large measure to the officers' justifiable certainty that they already knew precisely what they had seized. Thus, although it presumably would have been possible, as the court of appeals asserted, to procure a warrant here, there is no showing that it was unreasonable to proceed without one. The salient feature of *Chambers* v. *Maroney* and its progeny—applicable to containers found in a vehicle search by virtue of *Ross*—is that there is no need to demonstrate the infeasibility of securing a warrant in order to justify a warrantless probable cause search.

The court of appeals also erred in concluding that the rationale for the automobile search doctrine has no application here because of the facts of this case. Indeed, the court of appeals seems to have misunderstood the fundamental bases for the auto search doctrine, and was accordingly unable to recognize their applicability. In fact, both the "mobility" justification for the automobile exception, which turns on mobility of the vehicle at the time of its seizure, rather than at the time of the search, and the diminished expectation of privacy rationale, which the court of appeals wholly overlooked, support the warrantless search of respondents' marijuana bales conducted in this case.

ARGUMENT

THE SEARCH OF RESPONDENT'S MARIJUANA BALES THREE DAYS AFTER THEIR SEIZURE DURING A CONCEDEDLY LAWFUL VEHICLE SEARCH DID NOT VIOLATE THE FOURTH AMENDMENT

The court of appeals concluded that the bales of marijuana discovered in the course of the lawful warrantless automobile search at the airstrip could not themselves be searched without a warrant because they had been removed prior to the search from the pickup trucks in which they were found and because of the three-day lapse between the seizure and completion of the search. The conclusion is incompatible with the pertinent decisions of this Court and is not justified by any relevant policy or practical consideration.

A. This Court's Decisions Upholding Warrantless Automobile Searches Place No Limit On The Time That May Intervene Between Seizure Of The Vehicle And Completion Of The Search

1. In *United States* v. *Ross*, 456 U.S. 798 (1982), this Court held that the automobile search exception to the warrant requirement (first recognized in *Carroll* v. *United States*, 267 U.S. 132 (1925)) extends to all "containers and packages found inside the vehicle" (456 U.S. at 820; see also *id.* at 822) "in which there is probable cause to believe that [the object of the search] may be found" (*id.* at 824). The Court observed that a warrant to search a vehicle would suffice to authorize the search of containers found therein that could contain the object of the search (*id.* at 821), and it concluded that "the scope of the warrantless search authorized by [the automobile search] exception is no broader *and no narrower* than a magistrate could legitimately authorize by warrant" (*id.* at 825; emphasis added). "When a legitimate search is under way * * * nice distinctions between * * * glove compartments, upholstered seats, trunks, and wrapped packages * * * must give way," the Court stated (*id.* at 821), explaining (*id.* at 821 n.28):

> The practical considerations that justify a warrantless search of an automobile continue to apply until the entire search of the automobile and its contents has been completed.

Ross does not carve out any novel or unfamiliar exception to the warrant requirement. Rather, it simply applies the well-established automobile search doctrine recognized in *Carroll* and its progeny to containers found in the course of an automobile search.

See 456 U.S. at 825. Such container searches were held to be analytically inseparable from the search of the automobiles in which the containers are found. Thus *Ross* imports no special limitations upon the automobile search doctrine. The question in this case accordingly must be resolved by reference to this Court's decisions that address the permissible scope of warrantless automobile searches. Those cases indicate that the automobile search doctrine is not rendered inapplicable by the passage of time between seizure of an automobile and completion of a search.

2. In *Chambers* v. *Maroney*, 399 U.S. 42 (1970), the Court rejected a challenge to a warrantless station house search of an automobile, even though the search had been conducted at a time when no exigency rendered procurement of a warrant impracticable. The Court first observed that under *Carroll*, because probable cause was present, the vehicle could have been searched on the spot without a warrant at the time it was stopped (399 U.S. at 47-52). But the Court declined to limit the opportunity for a lawful warrantless search of the vehicle to the time and place of the seizure, observing that "[t]he probable-cause factor still obtained at the station house" (*id.* at 52). The Court did not comment upon the amount of time that had elapsed between the seizure and the search; plainly it was not a material consideration in the Court's analysis.

In *Chambers*, the district court and the court of appeals had upheld the delayed automobile search on a search incident to arrest theory, reasoning that, because it was dark at the time of the arrest (and the seizure of the automobile), it was reasonable to defer the search until it could be conducted at the station house. See *United States ex rel. Chambers* v.

Maroney, 408 F.2d 1186, 1192 (3d Cir. 1969), aff'g 281 F. Supp. 96, 100 (W.D. Pa. 1968). But this Court rejected the search incident to arrest rationale of the lower courts, stating "the reasons that have been thought sufficient to justify warrantless searches carried out in connection with an arrest no longer obtain when the accused is safely in custody at the station house" (399 U.S. at 47). The Court instead sustained the challenged search under the *Carroll* doctrine. *Chambers* thus indicates that warrantless automobile searches based on probable cause are free of the contemporaneity requirements ordinarily applicable to searches incident to arrest. See also *Cooper* v. *California*, 386 U.S. 58 (1967) (upholding warrantless auto search undertaken seven days after seizure).[5]

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[5] The auto in *Cooper* was seized under a forfeiture statute that was applicable to vehicles used to facilitate the illegal drug trade, and was held for use as evidence, and ultimately for sale by the state. The doctrinal basis of *Cooper* is not entirely clear. Cf. *Ross*, 456 U.S. at 809 n.11. It appears to rest in part upon a community-caretaking or officer-protection rationale, see 386 U.S. at 61-62, and has been understood to presage the inventory search doctrine of *South Dakota* v. *Opperman*, 428 U.S. 364, 372-375 & n.8 (1976). *Cooper* has also generally been viewed as reflecting the limited expectation of privacy that attaches to automobiles (as compared with homes and offices) under the Fourth Amendment, see *United States* v. *Chadwick*, 433 U.S. 1, 12 (1977); *Cady* v. *Dombrowski*, 413 U.S. 433, 439-448 (1973), and thus bears a close family relationship to the automobile search doctrine. No principled basis for distinguishing *Cooper* as respects the timing of a warrantless search has been suggested here. Indeed, to the extent *Cooper* rests on the proposition that no warrant is required to search a vehicle that there is probable cause to believe is subject to forfeiture, it is noteworthy that here not only the trucks but the bales containing the marijuana were subject to forfeiture. See 21 U.S.C. 881(a)(3).

Nor was there any suggestion in *Cardwell* v. *Lewis*, 417 U.S. 583 (1974), that delay vitiated the lawfulness of the warrantless search. Even though the examination of a car did not take place until the day after the seizure (see *id.* at 587-588), *Chambers* v. *Maroney* was deemed controlling. *Id.* at 593-596 (opinion of Blackmun, J.). Significantly, the Court's only comment on the delay was that it precluded justification of the search as an incident of the arrest. *Id.* at 591 n.7.[6]

The Court's opinion upholding a station house automobile search in *Texas* v. *White*, 423 U.S. 67 (1975), confirms that prompt completion of such a search is not a requirement of the *Carroll/Chambers* doctrine. The Court simply stated that, as in *Chambers*, " '[t]he probable cause factor' that developed at the scene 'still obtained at the station house.' " 423 U.S. at 68, quoting *Chambers*, 399 U.S. at 52 (brackets in original). In the Court's view, a sufficient basis for the search was that "there was probable cause to search respondent's car" (423 U.S. at 68).[7]

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[6] The dissenters in *Cardwell* found the automobile search exception inapplicable not because of delay between seizure and search, but because of the absence of generic exigency factors at the time of the original seizure—the car was parked, its owner was under arrest, and the police possessed the car keys. See 417 U.S. at 598. Whatever the correctness of the view that some kind of exigency must exist at the time of seizure (but see *United States* v. *Chadwick*, 433 U.S. 1, 12 (1977)), there is no dispute that any such requirement was satisfied in the instant case.

[7] Justice Marshall, joined by Justice Brennan in dissent, stated that it was irrelevant that the search was completed more promptly than a warrant could have been obtained, observing that "*Chambers* took such time elements out of the equation" (423 U.S. at 72 n.*).

Since *Texas* v. *White*, this Court has repeatedly confirmed that so long as the searching officers possess probable cause for a warrantless auto search at the time a motor vehicle is seized, a vehicle search remains lawful even if the place of the search changes and time or other law enforcement procedures intervene between the initial seizure and completion of the search. In *Michigan* v. *Thomas*, 458 U.S. 259 (1982), a vehicle was stopped for a traffic violation. Because the driver was underage and the passenger-owner had been arrested, a tow truck was called to take the vehicle to an impoundment lot. An on-the-scene inventory search disclosed the presence of two bags of marijuana in the auto glove compartment. A second, more thorough, search revealed a concealed loaded revolver. On the defendant's motion to suppress the revolver, the Michigan Court of Appeals held the second search unlawful because conducted without a warrant. 458 U.S. at 259-260. This Court reversed. Citing *Chambers*, the Court explained: "[W]hen police officers have probable cause to believe there is contraband inside an automobile that has been stopped on the road, the officers may conduct a warrantless search of the vehicle, even if it has been impounded and is in police custody" (458 U.S. at 261). Emphasizing that no exigency need be demonstrated as of the time of the completion of the search (*id.* at 261-262 & n.2), the Court reiterated (*id.* at 261; footnote omitted):

> [T]he justification to conduct * * * a warrantless search does not vanish once the car has been immobilized; nor does it depend upon a reviewing court's assessment of the likelihood in each particular case that the car would have been driven away, or that its contents would have

been tampered with, during the period required for the police to obtain a warrant.

Florida v. *Meyers*, No. 83-1279 (Apr. 23, 1984), continues this consistent line of authority. There the defendant's car had initially been searched at the time and place of his arrest. Certain items were seized at that point. The defendant's car was then towed and "impounded in a locked, secure area" (slip op. 1). Approximately eight hours later, a second warrantless search of the defendant's auto was conducted in which additional evidence was discovered. The Florida District Court of Appeal held that the additional evidence should have been suppressed, distinguishing *Chambers* on the ground that "in this case the element of mobility was removed because [the defendant's] vehicle had been impounded" prior to the second search (*Florida* v. *Meyers*, slip op. 1). This Court reversed on the authority of *Chambers* and *Thomas*, emphasizing that the impoundment of the vehicle in no respect rendered the warrantless automobile search doctrine unavailable.[8]

Thus, this Court's automobile search decisions do not require that a warrantless station house search based on probable cause be conducted within any particular interval following a seizure based on the same probable cause. Indeed, respondents have acknowledged as much in this Court, conceding that the automobile search doctrine permits such searches to be

[8] Justice Stevens, joined by Justices Brennan and Marshall dissented in *Meyers*, but solely on the ground that review by this Court was unwarranted. Justice Stevens stated that "[i]n this case the Florida District Court of Appeal for the Fourth District appears to have made an error" (slip op. 1), and remarked: "Clearly, the law in this area is well settled" (slip op. 2).

conducted "long after [an automobile has] been immobilized by impoundment at a law enforcement warehouse" (Br. in Opp. 31). Because *Ross* simply holds that, under the auto search "exception recognized in *Carroll*," a showing of probable cause "justifies the search of every part of the vehicle and its contents that may conceal the object of the search" (456 U.S. at 825), no basis exists for specially restricting the timing of warrantless automobile container searches.

3a. The court of appeals' disagreement with this principle appears to rest, at least in part, upon a single word taken out of context from a footnote in *Ross*. The sentence in question characterizes *Chambers* v. *Maroney* and *Texas* v. *White* as establishing "that if an immediate search on the street is permissible without a warrant, a search *soon* thereafter at the police station is permissible if the vehicle is impounded." 456 U.S. at 807 n.9 (emphasis added). The court of appeals evidently took the adverb "soon" to impose an outside temporal limit upon the completion of a warrantless automobile search somewhere short of three days. See Pet. App. 11a, 13a. But no question was presented in *Ross* that created any occasion for considering any such limit.[9] And the rather vague descriptive language ("soon thereafter") cited by the court of appeals simply alluded

[9] The facts of *Ross* include both a preliminary on-the-street search of an automobile trunk in which a container (a paper bag) was opened, and a subsequent, more thorough, station house search of the car in which an additional container (a zippered red leather pouch) was opened (456 U.S. at 801). Ross argued (Resp. Br. 6-7, 13-21) that *Chambers* v. *Maroney* should be overruled. But he did not argue that the timing of the station house search was impermissible.

to and reaffirmed the teaching of *Chambers* and *White*.[10] As noted above, those cases and their progeny plainly do not establish any rule requiring prompt completion of a station house automobile search.[11] Moreover, careful examination of footnote 9 in the Court's opinion in *Ross* confirms that the thrust of the Court's discussion is to reject—rather than to impose—arbitrary limitations upon the timing or location of the warrantless probable cause searches sanctioned by *Carroll*.

Thus, in tracing the contours and rationale of the *Carroll* doctrine, the Court observed, first, that subsequent cases, especially *Chambers*, make clear that the lawfulness of a warrantless search does not depend upon a demonstration that any exigency required an immediate search, or made it infeasible to limit police to a warrantless seizure to be followed by a warrant-authorized search. The Court explained that, "'[g]iven probable cause to search, either course is reasonable under the Fourth Amendment'" (456 U.S. at 807 n.9, quoting *Chambers*, 399 U.S. at 52). Second, the Court rehearsed the teaching of *Chambers* and *Texas* v. *White*, recognizing the lawfulness of post-seizure station house auto searches, as well as those conducted at the scene of a vehicle

[10] Of course, even if the word "soon" was intended to recognize some temporal limit upon completion of a warrantless automobile search, it hardly follows that that limit was exceeded by the time elapsed here.

[11] To the extent the court of appeals' decision rests upon a restrictive reading of the auto search doctrine, independent of any special considerations that govern its application to searches of containers found in the course of a lawful warrantless vehicle search, respondents have recognized that it is untenable (see Br. in Opp. 31).

seizure. The Court explained that "[t]hese decisions are based on the practicalities of the situations presented and a realistic appraisal of the relatively minor protection that a contrary rule would provide for privacy interests" (456 U.S. at 807 n.9). The Court thus recognized that given the magnitude of the "initial intrusion caused by a seizure of an automobile—which often could leave occupants stranded on the highway"—and the ability of police, if left no alternative, to carry out auto searches at the scene of the seizure, there is little to be gained in terms of the values protected by the Fourth Amendment by limiting warrantless search authority to the time and place of the seizure (*ibid.*). At the same time, the Court intimated, requiring on-the-scene searches may often be burdensome, impractical, or unsafe for police and accordingly is unjustified.

b. The policies that underlie the application of the automobile search doctrine to post-seizure station house searches confirm that the time limitation created by the court of appeals is not justified. Whether or not a station house search of a vehicle (and its contents) is undertaken at the earliest practical opportunity, its limited incremental impact upon the privacy interests of an individual who has been subject to a seizure of his motor vehicle is the same. Thus, no Fourth Amendment privacy interest of the individual is fostered by insisting that the search be carried out with particular expedition.[12]

[12] We note that while the Fourth Amendment requires that warrants "particularly describ[e] the place to be searched, and the persons or things to be seized," there is no comparable directive that the timing of a search be specified, much less that it be stated with particularity. The language of the Fourth Amendment reflects that the underlying policy of pro-

Indeed, the initial seizure, coupled with the clearly established authority of the officers to carry out an immediate warrantless search, leaves no basis for any legitimate expectation of privacy to be vindicated by imposing a warrant requirement as to less immediate searches. If anything, delay in completion of a warrantless search is beneficial to persons whose property has been seized, because it affords such persons a greater opportunity, if they have cause to challenge the lawfulness of the seizure, to move to compel the return of their property under Fed. R. Crim. P. 41(e), before any search occurs. See also pages 36-38, *infra*.[13]

A rule imposing time limitations upon completion of station house searches will, on the other hand, create needless burdens upon law enforcement analogous to those that would have resulted from a rule limiting warrantless auto searches to the scene of the seizure. Of course, police could ordinarily adopt

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tecting against unreasonable infringement of legitimate privacy expectations is not ordinarily advanced by controlling the timing, as opposed to the justification for or scope of, searches.

[13] Perhaps circumstances could be imagined in which a delay in conducting a search of a seized vehicle or other seized property would itself unreasonably interfere with the owner's possessory (as distinct from privacy) interest in the property. That cannot be so here because the agents possessed probable cause to believe that the bales were contraband in which no property interest could be recognized, see 21 U.S.C. 881, and because respondents never asserted that the agents had seized property in which they had a legitimate possessory interest. In any event, any such possessory interest could not logically support imposition of a warrant requirement, because interference with such an interest flows from the seizure and not the search, and issuance of a search warrant would not alleviate any injury caused by the delay.

the practice of completing searches at the place of the seizure or as soon as the seized property has been secured at the station house. But law enforcement resources are not unlimited. Even when there is no compelling reason, in terms of the progress of the particular investigation, for interrupting the search process, other law enforcement duties will frequently intervene. Some of these, such as responding to emergencies that threaten public safety and to investigative leads that require rapid follow-up, attending to the prompt initial appearance of arrested suspects before a judicial officer, or preparing contemporaneous reports documenting police officers' investigations, are objectively more pressing than completing a search of an automobile or its contents that has been seized upon probable cause. It would be ironic indeed if, by attending to competing law enforcement obligations that divert them from immediate completion of a station house search, law enforcement officers thereby incur an obligation to further delay any search, and further strain law enforcement resources, by having to seek a warrant before an intrinsically reasonable search can resume. Because a rigid requirement of prompt completion of a warrantless automobile search would afford no incremental protection to interests secured by the Fourth Amendment, " 'either course' "—completing a station house search at the earliest practicable moment or undertaking the search at the time that is most suitable from a law enforcement perspective in light of competing obligations and priorities—"is reasonable under the Fourth Amendment" (*Ross*, 456 U.S. at 807 n.9, quoting *Chambers*, 399 U.S. at 52).

Moreover, there will be cases in which it is impossible to complete a search within the ambiguously

defined interval allowed by the court of appeals. See, *e.g.*, *Cardwell* v. *Lewis*, 417 U.S. at 595 n.11 (opinion of Blackmun, J.). It is not at all clear from the court of appeals' opinion whether a warrant would be required even if the court is satisfied that the delay meets some standard of reasonable justification, or, perhaps, absolute necessity. But even assuming that the court of appeals would not press the present ruling that far, the result would be to thrust upon the courts the burden of assessing, on a case by case basis, whether the delay was "too long" in light of the factors that explain it, even though the outcome of this inquiry in no way promotes substantial individual privacy interests.

Indeed, this inquiry is especially likely to be sterile, for it is difficult to imagine what advantage law enforcement officers could possibly gain by unnecessarily delaying completion of an automobile search. On the contrary, there is every incentive for officers to complete a search as soon as practicable where the results of the search are material to advancing the investigation. Thus it is highly likely—were the inquiry pursued—that any delay would be found to be attributable to reasonable law enforcement resource allocation decisions, rather than any form of abuse.[14]

c. In *Ross*, the Court deliberately and explicitly rejected a technical approach to the application of the Fourth Amendment in automobile search cases that might obscure the clarity of the doctrine by burdening it with fact-bound assessments and distinctions to be developed through case-by-case adjudica-

[14] Of course, the cause of any significant delay that may have occurred in this case has never been ascertained. Prior to the court of appeals' decision there was no reason to believe that this would be a pertinent fact.

tion. The Court acknowledged that the broad bright-line "rules" it had established may at times "appear unsatisfactory" as "applied in particular cases" (456 U.S. 807 n.9). But the Court directed that these rules be applied without case-by-case adjustment because "[t]hey reflect * * * a reasoned application of the more general rule that if an individual gives the police probable cause to believe a vehicle is transporting contraband, he loses the right to proceed on his way without official interference" (*ibid.*). The Court also took particular note of the special "importance of striving for clarification" regarding the application of the automobile search exception, observing that "countless vehicles are stopped on highways and public streets every day, and * * * that it is not uncommon for police officers to have probable cause to believe that contraband may be found in a stopped vehicle." *Id.* at 803-804; see also *id.* at 825 (Blackmun, J., concurring); *id.* at 826 (Powell, J., concurring). The regime of case-by-case assessment of the reasonableness of the timing of station house auto searches portended by the court of appeals' decision would substantially impair the clear and readily administrable rule established in *Ross*: that the "scope of a warrantless search of an automobile" is "defined by the object of the search and the places in which there is probable cause to believe that it may be found" (*id.* at 824), and that the "justif[ications for] a warrantless search * * * continue to apply until the entire search of the automobile and its contents has been completed" (*id.* at 821 n.28). See also *Illinois* v. *Lafayette*, No. 81-1859 (June 30, 1983), slip op. 8; *Illinois* v. *Andreas*, No. 81-1843 (July 5, 1983), slip op. 7; *New York* v. *Belton*, 453 U.S. 454, 458-460 (1981).

B. The Scope And Timing Of A Warrantless Automobile Search Should Be No More Limited Than A Comparable Warrant Search

As we have observed, the Court's decision in *Ross* establishes that when a container discovered in a probable cause search of an automobile is reasonably capable of holding the object of the search, the container itself may be searched without securing separate legal authorization. 456 U.S. at 817-824. The Court noted that the justification for the warrantless search logically extends equally to containers found within the vehicle and to compartments that are constructed as an integral part of the vehicle (456 U.S. at 818):

> It would be illogical to assume that the outcome of *Chambers*—or the outcome of *Carroll* itself—would have been different if the police had found the secreted contraband enclosed within a secondary container and had opened that container without a warrant. If it was reasonable for prohibition agents to rip open the [automobile] upholstery in *Carroll*, it certainly would have been reasonable for them to look into a burlap sack stashed inside; if it was reasonable to open the concealed compartment in *Chambers*, it would have been equally reasonable to open a paper bag crumpled within it. A contrary rule could produce absurd results inconsistent with the decision in *Carroll* itself.

Because the *Carroll* doctrine "neither broadened nor limited the scope of a lawful search based upon probable cause" (*Ross*, 456 U.S. at 820), the Court reasoned that the permissible scope of a warrantless automobile search is the same as that which a magistrate could have authorized based upon the probable

cause on which the officers acted. 456 U.S. at 823, 825. Such a warrant search would, of course, extend to any container found with the vehicle that might contain the object of the search, just as a warrant to search fixed premises would extend to any enclosure found within it in which the item sought could be located. *Id.* at 821. Accordingly, as in the case of a warrant-authorized search of an auto, the "considerations that justify a warrantless search of an automobile continue to apply until the entire search of the automobile *and its contents* has been completed." *Id.* at 821 n.28 (emphasis added).

Ross thus teaches that the "scope of the warrantless search authorized by [the *Carroll*] exception is no broader and no narrower than a magistrate could legitimately authorize by warrant" (456 U.S. at 825). But for the magistrate's prior approval, which is "waived," "the search otherwise is as the magistrate could authorize" (*id.* at 823). This principle—that cases such as this are to be analyzed as though a warrant had issued at the time of seizure—requires reversal of the judgment of the court of appeals. As *Ross* makes clear (*id.* at 820-821 & n.27), if the search of the respondents' pickup trucks had been authorized by warrant, the officers undertaking the search of the bales of marijuana would not have been required to procure a second warrant to complete that procedure.[15] Nor would separate authorization have been required simply because three days had elapsed between the issuance of the hypothetical

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[15] See, *e.g.*, *United States* v. *Johnson*, 709 F.2d 515, 516 (8th Cir. 1983), relying on *Ross* in rejecting a claim that a second warrant was necessary to authorize a station house search of a safe discovered in a warrant-search of the defendant's house.

warrant and its execution. Rather, absent a showing that the completion of the search violated the reasonableness standard of the Fourth Amendment in some concrete respect—or violated the time limit fixed by the original warrant, which is ordinarily *ten* days (Fed. R. Crim. P. 41(c)(1))—completion of the search would have been authorized by the original warrant.

Of course, there may be circumstances in which, because of staleness or the acquisition of new information undermining probable cause, a delayed search becomes unreasonable. There is no such problem here, because the probable cause predicate for the original search and seizure was plainly unaffected by the passage of time. The bales believed to contain marijuana were continuously in the custody of law enforcement agents from the moment they were discovered in the pickup trucks, their contents unaltered. In sum, it seems clear that, in cases like this one, the hypothetical warrant that *Ross* teaches is conferred on agents at the time of a probable cause seizure of the vehicle may reasonably be executed several days later at a secure government facility.

C. None Of The Factors Relied On By The Court Of Appeals Renders The Automobile Search Doctrine Inapplicable In The Circumstances Of This Case

1. The court of appeals stated that the "factual basis of [its] holding" distinguishing this case from *Chambers* and *Ross* was that, instead of inspecting the contents of the marijuana bales at the point of seizure, or searching "the trucks and packages soon thereafter at their headquarters," the agents "chose to seize and impound the packages" and "stored the packages for three days" before opening them without a warrant (Pet. App. 13a). None of the factors considered by the court—the separation of the bales from the trucks, the impoundment of the bales, or the lapse of time between seizure and completion of the search—removes this case from the reach of the automobile search doctrine or the policies that define its scope.[16]

a. The court of appeals seemed to assume (see Pet. App. 12a-13a) that because of the physical sepa-

[16] As we observed in the petition (at 21-22), the court of appeals' decision conflicts with the decisions of other courts of appeals that have understood *Ross* to be applicable in circumstances remarkably similar to those presented here. For instance, in *United States* v. *Rivera*, 684 F.2d 308 (5th Cir. 1982), the court of appeals concluded that *Ross* required it to uphold a warrantless search of plastic wrapped bundles that proved to contain marijuana. Yet the search in that case—which, as in this case, took the form of extraction of core samples from the bales of marijuana—occurred more than 48 hours after the seizure of the bales. See *United States* v. *Rivera*, 654 F.2d 1048, 1050 (5th Cir. 1981). Similarly, in *Sharpe* v. *United States*, 712 F.2d 65 (4th Cir. 1983), cert. granted on other issues, No. 83-529 (June 18, 1984), the court of appeals recognized that *Ross* required it to "disavow" as "no longer valid" its prior ruling that a warrantless search of marijuana bales seized in the search of a pickup truck was unlawful. Yet, as the court's prior opinion indicates (see 660 F.2d 967, 969, 981-982 (1981)), the search in question had occurred at least two or three days after seizure. See also *United States* v. *Schecter*, 717 F.2d 864, 870-871 (3d Cir. 1983); cf. *United States* v. *Andreu*, 715 F.2d 1497, 1500-1501 & n.12 (11th Cir. 1983) (once officers had probable cause to search a vessel that was loaded on a trailer, a warrant was unnecessary even if there was time to secure one). These decisions—and respondents' failure to even advance the argument that delay in completing an automobile search renders *Ross* inapplicable (see page 7, *supra*)—"illuminate[] the profession's understanding of the scope of the search permitted under *Carroll*" and *Ross* (*Ross*, 456 U.S. at 819).

ration of the bales from the pickup trucks prior to the taking of the core samples, the search of the bales could no longer be considered an integral part of an automobile search, the *Carroll* doctrine accordingly should not apply, and the bales had to be regarded as containers subject to the warrant requirement of *Chadwick* and *Sanders*. But reliance on the location of the bales at the moment of the search misses the point of this Court's decisions.

Under *Ross*, the applicability of the *Carroll* doctrine to the search of a container does not depend on the location of the container at the time the container itself is opened for inspection, but turns instead upon the focus of the probable cause that authorized the automobile search and the warrantless seizure of the container. Thus, a primary reason for holding that the warrantless automobile search doctrine extends to inspection of suspicious containers found within an automobile was that the search of an automobile could not be regarded as complete or effective unless it extended to such containers. 456 U.S. at 818, 821 & n.28. The Court accordingly concluded that "the scope of a warrantless search of an automobile" is "defined by the object of the search and the places in which there is probable cause to believe that it may be found" (456 U.S. at 824). Under this standard, the removal of the bales of marijuana from the pickup trucks in which they were discovered, in the course of a lawful warrantless search, plainly does not vitiate the predicate for a warrantless search. The object of the search—to discover the contraband believed to have been placed in the trucks—remained the same, and the bales simply represented one of the places in which there was probable cause to believe that the contraband could be found.

Obviously, at some juncture in the course of an automobile search that discloses the presence of containers suspected of harboring the objects of the search, the containers ordinarily will be separated from the vehicle. As the Court observed in *Ross*, "[c]ontraband goods rarely are strewn across the trunk or floor of a car; since by their very nature such goods must be withheld from public view, they rarely can be placed in an automobile unless they are enclosed within some form of container" (456 U.S. at 820). In such cases it is rarely feasible to complete the search without removing the containers from the automobile. Indeed, this separation will often occur at or before the time the container is secured in police custody at the station house. Thus, insofar as the decision of the court of appeals depends on removal of the containers from the vehicle rather than on the passage of time, it would have the effect of rendering *Chambers* inapplicable to most searches of suspicious containers discovered in the course of a lawful warrantless automobile search. This result would largely overrule *Ross*, which teaches that such searches are not to be distinguished from the search of an automobile itself, and would largely nullify the practical consequences of *Chambers*. In *Ross* the Court pointedly refused to adopt such a constricting and self-defeating interpretation of the *Carroll* doctrine. See also *New York* v. *Belton*, 453 U.S. 454, 461-462 n.5 (1981).[17]

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[17] In *Belton* the Court rejected the "fallacious theory" that a seizure of property from an arrested suspect afforded police sufficient control over the encounter as to eliminate the justification for searching the property incident to arrest, noting that under this analysis "no search or seizure incident to a lawful custodial arrest would ever be valid" (453 U.S. at 462

The Court's discussion in *Ross* of *Chadwick* and *Sanders* confirms that the applicability of the auto search doctrine depends on the initial focus of probable cause, rather than on the location of the containers at the time of search. The reason the automobile search doctrine had no application in the latter cases is that "in neither *Chadwick* nor *Sanders* did the police have probable cause to search the vehicle or anything within it except the foot locker in the former case and the green suitcase in the latter" (456 U.S. at 814)—that is, in neither of the cases could the search be classified as an automobile search even at its inception. The Court also explained that the view that "the 'automobile exception' of *Carroll* applies whenever a container in an automobile was believed to contain contraband" has been "qualified by *Chadwick* and *Sanders*" (456 U.S. at 819 n.25). The temporary physical presence of a container within an automobile is thus an insufficient basis for excepting it from application of the warrant requirement.

By a parity of reasoning, the removal from a vehicle of a container, as an interim step in a search process that culminates in the examination of the contents of the container, *based on probable cause that extended to the vehicle as a whole*, is an insufficient basis for interposing a warrant requirement. Thus, contrary to the view of the court of appeals (see Pet. App. 12a), the fact that the Court in *Ross* distinguished rather than overruled *Chadwick* and

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n.5). To the extent that it rests upon the physical separation of the marijuana bales from the pickup trucks in which they were discovered, the decision below adopts a comparably fallacious approach to the search of containers found in an automobile search.

Sanders does not suggest that removal of a container from an automobile renders the auto search exception unavailable. Rather, it confirms the opposite conclusion, that the location of the container at the moment it is searched is not relevant to the proper inquiry in this case.

b. The impoundment of the bales of marijuana at the DEA warehouse is similarly irrelevant to the question whether the warrantless auto search doctrine is applicable to the ensuing completion of the search. As the Court stated in *Michigan* v. *Thomas*, 458 U.S. at 261, *Chambers* holds that when probable cause exists for a warrantless auto search, the search may be conducted without a warrant "even after [the vehicle] has been impounded and is in police custody"; the "justification to conduct such a warrantless search does not vanish once the car has been immobilized." To the extent the court below relied upon the impoundment of the marijuana bales in distinguishing *Ross* (see Pet. App. 13a) it made precisely the same error as the Florida court had made in *Meyers*, by reasoning that "the element of mobility had been removed because [the defendant's] vehicle had been impounded." See page 20, *supra*. Like that ruling, the ruling in this case "is clearly inconsistent with *Thomas* and *Chambers*" (*Meyers*, slip op. 3).

c. Nor does the passage of time between the seizure of the marijuana bales and the taking of core samples take this case outside the scope of the warrantless automobile search doctrine. As we have explained (pages 16-27, *supra*), this Court's automobile search decisions do not establish any requirement that a warrantless automobile search be completed immediately upon securing the vehicle at a

safe location, or even at the earliest practical opportunity. There is no reason why a different rule should apply to searches of containers that are authorized under *Carroll* and *Ross*. As we have explained, *Ross* establishes that the search of a container that is seized during a probable cause search directed at the contents of the vehicle as a whole is an integral part of an automobile search. "[U]ntil the container itself [is] opened the police could never be certain that the contraband was not secreted in a yet undiscovered portion of the vehicle" and the vehicle could not safely be released from further examination until the container was searched (456 U.S. at 821 n.28).

No Fourth Amendment policy consideration justifies limiting the automobile container search doctrine to cases in which inspection of suspicious containers discovered in an automobile has been completed with alacrity. Respondents acknowledge they "undoubtedly had a diminished expectation of privacy in their packages when the officers were entitled to search the packages, without a warrant, as part of an automobile search" (Br. in Opp. 30). Yet, neither they nor the court of appeals have offered any explanation as to how the passage of time between seizure of a container and its search could possibly serve to revive the individual's expectation of privacy in the container.[18] In fact, the residual expectation of pri-

[18] In point of fact, it is doubtful that respondents were even aware, until long after the search was complete, of any delay between the seizure of their bales and the completion of the search. And it is especially difficult to credit any claim that the delay gave rise to enhanced privacy expectations given that respondents never argued to the court of appeals—even after *Ross* had been decided—that the timing or location of the completion of the search made a warrant necessary.

vacy in these circumstances is negligible, at best. Because the officers needed no warrant—even under the court of appeals' view of the law—to open the bales they had seized either at the Bowie airstrip or "soon" after arrival of the bales at the DEA warehouse, any expectation that their unchanged contents would remain secret here would have been wholly unreasonable. See *Illinois* v. *Andreas*, No. 81-1843 (July 5, 1983), slip op. 5, 7-8; *United States* v. *Edwards*, 415 U.S. 800, 805-808 (1974).

The pointlessness of the Ninth Circuit's rule is especially evident on the facts of this case, because the distinctive odor emanating from the large cache of marijuana seized, as well as the characteristic appearance of the marijuana bales and the events preceding the seizure, obviated any need for an investigative search to ascertain the nature of the contents of the bales. Indeed, on the facts of this case a strong argument could be made that the containers announced their contents and accordingly "by their very nature [could not] support any reasonable expectation of privacy" sufficient to trigger a warrant requirement. *Arkansas* v. *Sanders*, 442 U.S. at 764-765 n.13; see *United States* v. *Jacobsen*, No. 82-1167 (Apr. 2, 1984), slip op. 10 n.17; *Texas* v. *Brown*, No. 81-419 (Apr. 19, 1983), slip op. 5-6 & n.5 (Stevens, J., concurring in the judgment).

But there is no need to reach that question here; at a minimum, the odor and appearance of the marijuana bales was sufficient to preclude any enhanced expectation of privacy from arising because of the lapse of time between the seizure and the actual penetration of the interior of the bales. Assuming that a significant delay in completing the search in fact occurred here (see page 5 note 2, *supra*), the

explanation appears to be at least in part that the officers were justifiably confident that they already knew precisely what they had found. In these circumstances, it is peculiar indeed to conclude that the mere passage of a few days' time made unreasonable the next investigative step preparatory to prosecution: the removal of core samples for laboratory analysis.[19]

At bottom, the court of appeals' reliance upon the timing of the core sampling operation is explained by its parting observation (Pet. App. 13a) that "[t]he officers could have easily obtained a warrant * * * during those three days." But in all likelihood this was equally true of the eight hours that elapsed in *Meyers*, and it was assuredly true of the seven day delay in *Cooper* v. *California*. But as Justice Black explained for the Court there (386 U.S. at 62, quoting *United States* v. *Rabinowitz*, 339 U.S. 56, 66 (1950)):

> It is no answer to say that the police could have obtained a search warrant, for "[t]he relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable."

---

[19] We note that this investigative technique was rather unobtrusive in nature. In the exceedingly unlikely event that the officers were mistaken in their belief that the large bales contained marijuana, the officers probably would have learned only that the bales contained some bulk agricultural commodity of low privacy value. Moreover, even assuming that the bales contained straw designed to cushion fragile goods, the technique of core sampling employed here probably would not identify the nature of those goods. Cf. *United States* v. *Jacobsen*, slip op. 12-14; *United States* v. *Place*, No. 81-1617 (June 20, 1983), slip op. 10-11.

See also *United States* v. *Edwards*, 415 U.S. at 807. The court of appeals, however, did not identify any affirmative respect in which the warrantless search was less than reasonable. Instead, its ruling seems to rest in large measure upon an indistinctly articulated premise that the automobile search exception must be narrowly confined to circumstances in which its rationale is most compelling—*i.e.*, those in which a warrant requirement would wholly defeat a legitimate law enforcement objective.

While this approach is sustainable for many classes of cases, it is plainly incorrect where the automobile search doctrine is applicable. See *Ross*, 456 U.S. at 807 & n.9. Thus, the Court has frequently "sustained 'warrantless searches of vehicles . . . in cases in which the possibilities of the vehicles being removed or evidence in it destroyed'" while a warrant was sought "'were remote, if not nonexistent.'" *Chadwick*, 433 U.S. at 12, quoting *Cady* v. *Dombrowski*, 413 U.S. 433, 441-442 (1973). And even in cases where such risks do exist, the Court has recognized that the *Carroll* warrantless search doctrine cannot logically be justified by reference to the mobility of automobiles alone, for a warrantless seizure would frequently be sufficient to prevent interference with an ensuing search. *Ross*, 456 U.S. at 807 n.9. Nor is a "demonstrable 'exigency'" at the time of the search a necessary predicate for a warrantless automobile search (*Michigan* v. *Thomas*, 458 U.S. at 261 n.2). The lawfulness of such a search does not depend on a reviewing court's assessment of the likelihood that procuring a warrant would have interfered with legitimate law enforcement objectives in the particular case. *Id.* at 261; see pages 19-20, *supra*. In short, this Court has deliberately opted for

broad, easily administrable, general rules in marking out the contours of the automobile search doctrine.

d. For reasons already stated, this Court's decisions make clear that there is no occasion to reconsider the applicability of the rationale for the automobile search exception on a case-by-case basis, or to the circumstances of this case specifically. In any event, the court of appeals erred seriously in suggesting that the rationale for the automobile search exception does not apply to "packages secured for three days at a government warehouse" (Pet. App. 13a).

First, the court of appeals overlooked the Court's recognition that, strictly speaking, the mobility factor usually justifies only a warrantless seizure, and not a warrantless search of an automobile. As the Court made clear in *Chambers*, 399 U.S. at 52 (see also *Ross*, 456 U.S. at 807 n.9), to the extent the auto search doctrine rests upon the mobility factor, it depends upon the view that, in light of the magnitude of the intrusion effected by stopping an automobile (at which juncture it is infeasible to secure a warrant), any additional intrusion occasioned by a warrantless search after the vehicle is immobilized is insufficient to trigger a warrant requirement. Viewed from this perspective, it is erroneous to discount the "mobility" factor simply because the bales of marijuana were "secured for three days at a government warehouse" (Pet. App. 13a). As we have explained (pages 23-24, and 35-38, *supra*), the scope of the incremental intrusion occasioned by a warrantless search of a container does not vary depending upon the speed with which it is completed following seizure of the container, based upon probable cause, during an automobile search.

Second, the court of appeals wholly ignored the "diminished expectation of privacy which surrounds the automobile," which provides a principal and independent justification for the automobile search doctrine itself. See *United States* v. *Chadwick*, 433 U.S. at 12; see also *South Dakota* v. *Opperman*, 428 U.S. 364, 367-368 (1976). This privacy factor underlies the Court's decisions "sustain[ing] 'warrantless searches of vehicles . . . in cases in which the possibilities of the vehicle's being removed or evidence in it destroyed were remote, if not nonexistent.'" *Chadwick*, 433 U.S. at 12, quoting *Cady* v. *Dombrowski*, 413 U.S. at 441-442. *Ross* teaches that this diminished expectation of privacy extends both to "a vehicle and its contents * * * if probable cause is given to believe that the vehicle is transporting contraband" (456 U.S. at 823), and reaffirms that limiting warrantless searches to on-the-spot examinations undertaken immediately would provide no significant protection for privacy interests (*id.* at 807 n.9). And as we have explained, neither any delay in completing the inspection of containers, nor the physical separation of containers from the vehicle in which they were found (circumstances that the owner of seized property is likely to be ignorant of until long after the search has been completed) serves in any way to augment the privacy expectations of the property owner. Thus the diminished privacy expectation analysis is also fully applicable here.

2. The court of appeals' conclusion that the delay between the seizure of the marijuana bales and the completion of the search made it necessary to secure a warrant rests to a large extent upon a line of Ninth Circuit cases concerning searches of property

within the immediate control of an arrestee, sought to be justified as incident to the arrest, but which were not completed until after the arrest encounter was concluded. In *United States* v. *Monclavo-Cruz*, 662 F.2d 1285 (1981), the court of appeals had held impermissible the search of an arrestee's purse conducted an hour after the arrest, at a station house location removed from that of the arrest.[20] In *United States* v. *Burnette*, 698 F.2d 1038 (1983), however, the court of appeals had upheld a station house search of an arrestee's purse, distinguishing *Monclavo-Cruz* on the ground that a cursory initial search of the purse carried out at the time of the arrest so diminished the arrestee's expectation of privacy therein as to justify the subsequent warrantless search. The court below concluded that *Burnette* and *Monclavo-Cruz*, taken together, required rejection of any argument that a "delayed" warrantless search should be upheld as reasonable simply because it lawfully could have been carried out at an earlier juncture without a warrant (Pet. App. 10a-11a, 13a).

The court of appeals' reliance upon decisions governing the search incident to arrest doctrine was misplaced. Of course, it is well established that "[o]nce law enforcement officers have reduced luggage or other personal property not immediately associated with the person of the arrestee to their exclusive control, and there is no longer any danger that the arrestee might gain access to the property to seize a weapon or destroy evidence, a search of that property is no longer an incident of the arrest." *Chadwick*, 433 U.S. at 15. Because the objectives of

[20] This result would not appear to survive *Illinois* v. *Lafayette, supra.*

protecting law enforcement officers and preserving evidence are typically the basis for allowing searches incident to an arrest, see *Chadwick*, 433 U.S. at 14, when all potential for threatening action by an arrestee is removed, the justification for a search incident to arrest ordinarily is no longer viable, even though there may have been valid reasons for deferring the search.

Thus, in both *Chambers* v. *Maroney* and *Cardwell* v. *Lewis*, the Court noted that a search incident to arrest rationale would not support the delayed automobile searches undertaken (see pages 16-18, *supra*). But in the very same cases, of course, the Court upheld the application of the automobile search doctrine, notwithstanding the delay. Thus, *Chambers* and *Cardwell* indicate that warrantless automobile searches are free of the contemporaneity requirement ordinarily applicable to searches incident to arrest.[21] The court of appeals' attempt to extract a governing principle for this case from decisions respecting searches incident to arrest accordingly is unsound. Unlike searches incident to arrest, which do not depend on probable cause and which are ordinarily predicated upon circumstances prevailing at the time of an arrest, the justifications for a warrantless automobile search—probable cause coupled with the prior intrusion effected by the antecedent seizure and the diminished expectation of privacy that inheres in automobiles, are not eroded by the passage of time.

[21] The contemporaneity requirement is not uniformly applicable to searches incident to arrest. As the Court recognized in *United States* v. *Edwards, supra,* the justification for a search incident to arrest is not eliminated upon completion of the arrest when the search is directed to property that continues following arrest to be associated directly with the person of the arrestee.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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Supreme Court of the United States

October Term, 1984

UNITED STATES OF AMERICA,
Petitioner,

v.

LYLE GERALD JOHNS, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the automobile exception to the warrant requirement should be extended to allow the warrantless search of packages found in an automobile three days after their seizure when the focus of the police investigation was on the packages and there was no automobile search in progress at the time of their seizure.

2. Whether the automobile exception to the warrant requirement should be extended to allow searches not justified by the reasons that support the exception.

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STATEMENT

Respondents adopt the statement of Petitioner in the BRIEF OF THE UNITED STATES (hereinafter Pet. Br.) with the following additions and corrections.

1. In Pet. Br. 3, the Petitioner recites that Customs officers maintained surveillance of the two trucks as they travelled one hundred miles to a private airstrip near Bowie, Arizona. While enroute to Bowie, the vehicles were stopped by Arizona state authorities who were in the process of monitoring highway traffic. Upon noticing the stop, surveilling Customs officers requested by radio that the occupants of the trucks be identified. Customs officers thereafter learned the identity of the occupants of the trucks. They also were told by the state police that the occupants of the vehicles stated that they were en route to Bowie to pick up an old auto which had broken down, but upon examination of the trucks, the police could not detect any towing equipment, bars, ropes, etc. They further learned that one officer, upon examination, detected a toy derringer in one of the vehicles. 11/9/81 Tr. 64, 208.

2. In Pet. Br. 4, Petitioner indicates that as the Customs officers approached the trucks to investigate, they detected the odor of marijuana and then saw Respondents throw a blanket over the contents of one of the trucks. Petitioner then alleges that "[i]n the trucks, the officers found some 40 square packages wrapped in plastic and dark green trash bags secured with tape."

This recitation is both cursory and not fully supported by the record. The first officer on the scene (Officer Eshelman) noticed two trucks parked back to back as he approached the vehicles. When the officer got within

about 30 yards of the vehicles, he noticed several individuals covering up plastic garbage bags in the rear end of one of the trucks (a Chevrolet). He then exited his vehicle, ordered the Respondents to come out from behind the trucks, and approached the trucks. As he approached, he smelled the odor of marijuana. He approached the Chevrolet, opened the rear cargo door, which had just been closed, and observed the packages which he had seen as he exited his automobile some 30 yards away. He then looked into the back of the other truck (the GMC), which was open, and noticed similar packages there. 11/9/81 Tr. 212-16. The packages seen in each vehicle were of two types: some were cardboard boxes wrapped in heavy, double-ply green garbage bags which were taped with heavy masking tape, and others were in two thicknesses of heavy bags taped with masking tape. The packages in each vehicle were partially covered by blankets, but visible to the officer as he approached the vehicles. 11/9/81 Tr. 134.

As the first officer exited his vehicle, a second officer (Officer Young) pulled up behind him. He exited his vehicle and, as the officers approached the trucks together, he smelled the odor of marijuana and saw the packages in the open GMC truck simultaneously from a distance of approximately 15 to 20 feet. 11/9/81 Tr. 126-28. Both officers, at this point, believed the packages to contain marijuana based on the odor, their experience with smuggling operations of this type, and the fact that marijuana was commonly wrapped in packages of the sort they observed as they approached. 11/9/81 Tr. 128, 216. The Respondents were then placed under arrest. Officer Eshelman advised Officer Young that they had "two trucks loaded

with marijuana." The trucks were transported to the Drug Enforcement Administration headquarters in Tucson and the packages stored in a warehouse for three days.[1] Thereafter, the packages were opened and core samples removed.[2] No searches of the trucks were done at the scene or at any time thereafter. 11/9/81 Tr. 129, 215-17.

3. In the trial court and on appeal to the United States Court of Appeals for the Ninth Circuit, the Petitioner initially argued that the search of the packages was permissible because the packages were discovered in plain view and not as the result of any search of the vehicles. Brief of Appellant, Ct. App. 5, 10-11.

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[1]The Petitioner's allegation, Pet. Br. 4, that "the officers found some 40 square packages" in the trucks at the scene is not supported by the record. There is no evidence that the officers did anything at the scene other than take a "quick look" at the packages and then transport them to the Drug Enforcement Administration headquarters. 11/9/81 Tr. 135. Neither vehicle was searched at the scene. 11/9/81 Tr. 129. In his statement of facts in support of his MEMORANDUM OF DECISION AND ORDER, the trial court found only that the officers "view[ed] the sealed containers." No search of the vehicles or counting of the containers is to be found in the record. Pet. App. 21a.

Petitioner's citations of authority for the allegation that the packages were counted at the scene is not supported by the record. In fact, one citation given by Petitioner, 12/11/81 Tr. 35, indicates that when the packages were counted, at the warehouse, there were "approximately" 44 sacks. There is no indication from that citation that the packages of marijuana were counted at the scene, or given anything other than a cursory glance.

[2]There is no evidence in the record to indicate how the samples were removed from the packages, how much was taken from each package of marijuana, or from which packages of marijuana samples were taken.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents two related but independent issues with respect to the application of the automobile exception to the warrant requirement and its relationship to package searches: (1) whether the automobile exception to the warrant requirement should be extended to allow the warrantless search of packages found in an automobile three days after their seizure when the focus of the police investigation was on the packages and there was no automobile search in progress at the time of their seizure; and (2) whether the automobile exception to the warrant requirement should be extended to allow searches not justified by the reasons in support of the exception.

Petitioner contends that the search of the packages of marijuana performed at the station house three days after the seizure of the packages was permissible because of an "initial, concededly lawful search of the trucks" at the scene. Pet. Br. 9-10. Petitioner reasons that since the packages could have been lawfully searched there, that they could lawfully be searched later pursuant to this Court's decision in *United States v. Ross*, 456 U.S. 798 (1982).

Ross, however, is not controlling given the facts of this case. *Ross* applies only to situations where police officers are engaged in a legitimate vehicle search and need to search packages which are found during the course of the search to finish the search. No vehicle search was ever conducted in this case. Hence, pursuant to this Court's opinion in *United States v. Chadwick*, 433 U.S. 2 (1977), a warrant was required for the search of the packages.

Even assuming that there was a legitimate vehicle search at the scene, *Ross* should not be extended to cover this case, because to so extend *Ross* would be to extend the automobile exception to the warrant requirement beyond the reasons for the exception.

A. This case is not controlled by *Ross* because the packages seized in this case were not seized as a part of an ongoing vehicle search. Rather, they were seized when the focus of a police investigation was exclusively on the packages at a time moments after they were placed in the rear compartment of two pickup trucks. There is no evidence in the record that the officers in this case ever conducted a search of the vehicles in which the packages were found or ever focused their investigation on the vehicles. Therefore, the automobile exception to the warrant requirement does not apply in this case. This case must be governed by the general rule that packages may be searched only with a warrant issued by a neutral and detached magistrate.

B. Even if the Customs officers had lawfully searched the trucks, they would not have been able to search the packages three days later at the D.E.A. warehouse without a warrant. All warrantless searches are *per se* unreasonable, subject to a few, well-delineated exceptions. *Mincey v. Arizona*, 437 U.S. 385, 390 (1978). These exceptions are no broader than the reasons that gave rise to them. *Id.* at 405; *New York v. Belton*, 453 U.S. 454, 457 (1981). Most of these exceptions permit warrantless searches only when it would be impracticable to obtain a warrant. *United States v. United States District Court*, 407 U.S. 297, 318 (1972).

The presumption in favor of warrants does not apply to automobiles. *Florida v. Meyers,* no. 83-1279 (Apr. 23, 1984), slip op. 3. The reason the presumption does not apply is that since the time that the Fourth Amendment was enacted, it has been understood that transportation vehicles can be searched without a warrant. *United States v. Ross,* 456 U.S. at 805-06. Therefore, the practicability of obtaining a warrant does not affect the right to search an automobile. *See Michigan v. Thomas,* 458 U.S. 259, 261-62 & n. 2 (1982). If the police have probable cause, they can conduct a warrantless search of an automobile where it is found on the highway, or days later, after it has been impounded at the police station. *Id.*

The presumption in favor of warrants does apply to packages. *United States v. Chadwick,* 433 U.S. at 7. An exception to this warrant requirement occurs when the packages are found inside an automobile during the course of a lawful automobile search. *United States v. Ross,* 456 U.S. at 824-25. As part of the automobile search, the police may conduct a warrantless search of the packages if the object of their search might be found inside the packages. *Id.*

Two reasons support this exception to the warrant requirement. First, requiring the police who are conducting a lawful warrantless search of an automobile to stop their search and apply for a warrant any time a package is found would unduly hinder the completion of the automobile search. The police would never be sure they had completed the automobile search until they had obtained a warrant to search every package found inside the automobile. *Id.* at 820, 822, n. 28 . This would undermine the rationale that permits the warrantless search of automobiles.

Second, the police and the lower courts need a bright line rule that will tell them when a warrantless search is permissible and when it is not. *Id.* at 803-04. This exception, which tells them that they may conduct a warrantless search of packages as part of a lawful automobile search, provides that bright line rule.

This exception to the warrant requirement, like its other exceptions, should not be any broader than the reasons that gave rise to it. The reasons behind this exception do not justify its application to this case. First, the search of the packages was delayed for three business days. The agents had ample opportunity to obtain a warrant during those three days. If they had obtained a warrant, the search of the pickups would not have been delayed or hampered in any way. The rationale behind the automobile exception would not have been undermined. Second, in drawing any bright line, the first principle of Fourth Amendment jurisprudence, that all warrantless searches are *per se* unreasonable, should be emphasized. *New York v. Belton,* 453 U.S. at 457. Stressing this principle, the *Ross* court drew the line so that automobile searches would not be made impractical by a requirement that the police obtain a warrant every time a package is found during an automobile search. Requiring the police to obtain a warrant to search the packages in this case would not have hindered or impeded the search of the pickups. As this Court has done in the past, the bright line should be drawn where it became practicable to get a warrant. *Michigan v. Tyler,* 436 U.S. 499, 511 (1978), *United States v. Chadwick,* 433 U.S. at 15-16.

The Petitioner's reliance on the various cases that allow the warrantless search of automobiles days after they have been impounded at the police station is misplaced. None of these cases involved the searches of packages; they involved the searches of automobiles. Since warrants are virtually never required to search an automobile, the practicability of obtaining a warrant before the search is irrelevant. The same is not true of packages. Warrants are normally required to search packages. Therefore, warrantless searches of packages should not be allowed unless it was not practical to obtain a warrant. If the police find a package in the course of a lawful automobile search, it would be impractical to require them to obtain a warrant before they could complete the automobile search by looking into the package. It is not impractical, however, to require them to obtain a warrant days after the automobile search has been completed and the packages have been secured in a government warehouse.

C. The other reasons advanced by the Petitioner do not justify reversing the Court of Appeals. Contrary to the Petitioner's argument, the statement in *Ross,* that the warrantless search of an automobile may be as thorough as a magisrate could authorize in a warrant (456 U.S. at 800), does not support this search. The Respondents do not complain about the thoroughness of the search. Rather, the Respondents complain that the packages were secured for three days before they were searched without a warrant.

The Petitioner also argues that the fact that the novelty of Respondents' position illuminates the "profession's

understanding" that the position does not have merit. Before *Ross,* most litigants would have relied on *Robbins v. California,* 453 U.S. 420 (1981). Only two years have elapsed since *Ross* was decided. That is not enough time to illuminate the profession's understanding. Next, the Petitioner argues that in most automobile searches, packages and other containers will be removed from the automobile before they are searched. The Respondents' argumentment is not based on the mere separation of the packages from the trucks. Rather, Respondents' position is that the focus of the investigation was limited to the packages and that their search was not part of any on-going vehicle search.

Finally, the Petitioner argues that the Respondents had a diminshed expectation of privacy in their packages which would allow a warrantless search. To the extent this argument is based on a claim that the packages could not support any reasonable expectation of privacy because, by their very nature, they announced their contents, *Arkansas v. Sanders,* 442 U.S. 753, 764-65, n. 13 (1979), it is untenable. The District Court, after hearing all the evidence, rejected this argument, finding that neither the shape, nor any other characteristic of the packages, made their contents readily ascertainable. Pet. App. 28a. Nevertheless, Petitioner argues, relying on *United States v. Rabinowitz,* 339 U.S. 56 (1950), that the searches were reasonable. The Petitioner omits that *Rabinowitz* was overruled by *Chimel v. California,* 395 U.S. 752, 760, 768 (1969). The search was not reasonable because it was a search of packages without a warrant and because the search was not done as part of an automobile search, but was done three days later when the packages had been secured at the D.E.A. warehouse.

ARGUMENT

I.

The Warrantless Search Of Packages Three Days After Their Seizure From Vehicles Not The Focus Of Searches Themselves, Violated The Fourth Amendment.

Prior to *United States v. Ross,* 456 U.S. 798 (1982), this Court held that packages found in the course of a lawful automobile search could be seized but not searched themselves except pursuant to a legally obtained search warrant. *Robbins v. California,* 453 U.S. 420 (1981). In *Ross,* however, this Court overruled *Robbins,* holding that the automobile search exception to the warrant requirement applies to all "containers and packages" found inside the vehicle during a lawful vehicle search. 456 U.S. at 824-25.

In *Ross,* the police had information from a reliable informant who told them that a subject would be carrying narcotics in the trunk of his car. The informant, who had been proven reliable in the past, gave a detailed description of the driver and the automobile. Upon seeing a vehicle and driver matching the descriptions given, police officers stopped the vehicle and began a thorough search of the interior of the vehicle. They searched the entire interior of the car, including the glove compartment. They then took the driver's keys, opened the trunk and found a closed brown paper bag. The bag was opened, disclosing a number of glassine bags containing a white powder, which the police believed to be a narcotic drug. The police replaced the bag, closed the trunk, and drove the car to headquarters.

At the station, they searched the car again, discovering a zippered pouch in the trunk containing a large sum

of cash. A later laboratory analysis determined that the powder in the paper bag was a narcotic.

Despite the fact that no warrant was obtained for either the search of the brown paper bag during the first search of the automobile or the search of the red zippered pouch at the station house, this Court held that the searches of both packages were legal pursuant to the automobile exception of the warrant requirement.

Essential to this Court's holding in *Ross* was the fact that both the paper bag and the zippered pouch were found "in the course of a legitimate warrantless search of an automobile." 456 U.S. at 817.

In *Ross,* this Court stressed practical considerations that justify a warrantless search of the package found in the course of a warrantless automobile search.

> "*When a legitimate search is underway,* . . . nice distinctions between . . . glove compartments, upholstered seats, trunks, and wrapped packages . . . must give way to the interest in the prompt and efficient completion *of the task at hand.*" 456 U.S. at 821. (emphasis added)

This Court's holding in *Ross* was grounded in the practical need of police officers to complete a search of a vehicle wherein they suspect contraband might be found when the locus of the contraband is undetermined. In such a case, this Court reasoned that to allow less than a search of the entire automobile would be to frustrate the purpose of the automobile exception to the warrant requirement.

> "The practical considerations that justify the warrantless search of an automobile continue to apply

until the entire search of the automobile and its contents has been completed." *Id.* at 821, n. 28.

The Court's decision in *Ross,* which allows the warrantless search of the package found during the course of a legitimate automobile search must be contrasted with the general rule that police officers must obtain a warrant to search a package, even if the package is found in an automobile, when the focus of the investigation is not on the automobile, but rather on the package.

In *United States v. Chadwick,* 433 U.S. 1 (1977), this Court considered the search of a footlocker which agents had probable cause to believe contained narcotics which had been loaded into the trunk of a vehicle. In determining that a warrant was required to search the footlocker even though it had been lawfully seized from an automobile, this Court reaffirmed the historical principle that sealed packages are included in the reach of the Warrant Clause. 433 U.S. at 10. *Cf. United States v. Van Leeuwen,* 397 U.S. 249 (1970); *Ex parte Jackson,* 96 U.S. 727 (1878).

This Court explicitly recognized in *Ross* that *Chadwick* still applies. But the contrasting facts in *Ross* and *Chadwick* provide the basis for the distinction between when packages may or may not be searched without a warrant. As in *Ross,* packages may legally be searched without a warrant if they are seized during the course of a legitimate automobile search in which the focus of the search is on the automobile and whatever contents the automobile contains. Packages may be searched only with a warrant where the focus of the investigation is on the packages themselves and not on the entirety of the vehicle in which they are placed.

The facts of this case require the issuance of a warrant prior to the search of the packages themselves. The following are facts from which one must conclude that the focus of the police investigation at the time of the seizure of these packages was on the packages themselves, not on the vehicles:

1. At the scene of the seizure, no search of either of the vehicles was performed. In fact, when asked whether he performed any search, Officer Young indicated that he did not. 11/9/81 Tr. 129. In its MEMORANDUM OF DECISION AND ORDER, the trial court found only that the police officers' "view[ed] the sealed containers" before they handcuffed and arrested the Respondents and took the containers to a warehouse. Pet. App. 21a.

2. There is nothing in the record to establish that a search of the vehicles was performed at any time subsequent to the vehicles being removed from the scene of the seizure.

3. All indications in the record are that the police officers focused their attention exclusively on the packages from the moment they arrived on the scene. Both officers testified at trial that they believed that marijuana was in the boxes because, in their common experience, marijuana was "commonly" packaged in a like manner. They further knew that prior to their seizure of the packages, there had been no odor of marijuana eminating from the trucks and no packages in the trucks when they were stopped a short time earlier by Arizona state police on the highway.

An additional indication that the focus of the investigation was directed at the packages and not the automobile

is the position of the Petitioner before the trial court and the United States Court of Appeals for the Ninth Circuit prior to this Court's decision in *Ross*. Before both lower lower courts, Petitioner's initial position was that the search of the packages at issue was justified without a warrant on the grounds that they were seized, not pursuant to any search, but because they announced their contents by being within the plain view of the officers as they approached the trucks.[3] Indeed, the focus of the police investigation on these packages began, not during a legitimate warrantless search of a vehicle pursuant to the automobile exception, but while the police officers were approaching the Respondents from a distance of 15-30 feet.

Petitioner argues that a line of cases upholding station house automobile searches after some delay supports the search of the packages in this case. Pet. Br. 18-21. Those cases provide no help in determining the legitimacy of the search in this case. In each of those cases, although there was a delay in the search at issue, the subsequent search which the police conducted at the station house was an automobile search with the focus of the investigation on the automobile as a whole and its contents, whatever they might be. For example, in *Florida v. Myers,* No. 83-1726 (Apr. 23, 1984), the defendant's car had initially been searched when he was arrested. His car was then impounded and searched a second time without a warrant

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[3]While it is clear from the trial court's Order and the Opinion of the Court of Appeals that the facts of the case did not put the marijuana in "plain view", the position of Petitioner that the packages were not seized pursuant to a search of the vehicles is a clear indication that the focus of the officers was on the packages.

at which time additional evidence was discovered. When the Florida District Court of Appeal ruled that the evidence found during the second search should have been suppressed, this Court summarily reversed, finding that the second search was subject to the automobile exception. In this case, unlike *Meyers,* there is no evidence of a later vehicle search to which the automobile exception can apply. In this case, the focus was always on the packages.

Juxtaposing this Court's holdings in *Chadwick* and *Ross,* it is clear that the difference between those two decisions is that in *Chadwick,* the focus was on the footlocker, whereas in *Ross,* the focus was on the automobile and the police searched the packages as part of an ongoing vehicle search. In this case, the focus of the police officers, by their testimony and by their actions, was on the packages and not on the vehicles. No legitimate vehicle search was in progress when the packages were seized. Consequently, this case must be governed by the law of package searches, which requires a warrant, and not by the automobile exception to the warrant requirement.

II.

The Reasons Supporting The Ross Exception To The Warrant Clause Do Not Justify This Search.

Even if the Customs officials had conducted a lawful warrantless search of the trucks, they would not have been able to open the packages three days later at the D.E.A. warehouse in Tucson without a warrant. Under normal circumstances, a warrant is required to search packages. An exception to that requirement occurs when the packages are found in an automobile in the course

of a lawful automobile search. Well-established Fourth Amendment principles prohibit the search of these packages, because the reasons that would justify an exception to the warrant requirement if the packages had been searched contemporaneously with the trucks no longer applied when the packages had been secured at the D.E.A. warehouse.

The applicable principles.

The threshold question in any Fourth Amendment analysis is whether a person has a reasonable expectation of privacy in the house, paper or effect that has been seized or searched. *Katz v. United States*, 389 U.S. 347, 351-52 (1967); *Rakas v. Illinois*, 439 U.S. 128, 139 (1978). Unless such a reasonable expectation of privacy exists, the Fourth Amendment inquiry is at an end. *Id.* at 139-40. The expectation of privacy that is necessary to trigger the protection of the Fourth Amendment was separated into two components by Justice Harlan. First, the person must have an actual, subjective expectation of privacy. Second, that subjective expectation of privacy must be one that society is prepared to recognize as reasonable. *Katz v. United States*, 389 U.S. at 361 (Harlan, J., concurring). The second component is virtually always met if the person's subjective expectation is objectively justifiable under the circumstances. *Smith v. Maryland*, 442 U.S. 735, 740 (1979). Justice Harlan's analysis has been adopted by this Court. *Id.*

If the subjective expectation is recognized, the Fourth Amendment creates a strong presumption in favor of war-

rants. *Mincey v. Arizona*, 437 U.S. at 390 (1978).[4] The few exceptions that have been created to this rule have been specifically established and well-delineated. *Id.* In keeping with the presumption in favor of warrants, these exceptions are no broader than necessary to satisfy the reasons that gave rise to them.[5] This is especially true when an exception allows the search of an area that is normally protected by the warrant requirement. Typically, these exceptions are allowed because the immediate objective requirements of the situation make it impracticable to get a warrant. *See United States v. United States District Court*, 407 U.S. 297, 318 (1972). This Court has

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[4]The *Mincey* court unanimously held that warrantless searches are *per se* unreasonable. 437 U.S. at 390, 405 (Rehnquist, J., concurring in part and dissenting in part). This "first principle of Fourth Amendment jurisprudence", *New York v. Belton*, 453 U.S. 454, 457 (1981), enjoys a long history of support in this Court. *See Ross v. United States*, 456 U.S. at 824-25; *G.M. Leasing Corp. v. United States*, 429 U.S. 338, 352-53 (1977); *South Dakota v. Opperman*, 428 U.S. 364, 381 (1976) (Powell, J., concurring); *Chambers v. Maroney*, 399 U.S. 42, 61 (1970) (Harlan, J., concurring in part and dissenting in part); *Katz v. United States*, 389 U.S. at 356-57; *United States v. Rabinowitz*, 339 U.S. 56, 70-71 (Frankfurter, J., dissenting); *see Michigan v. Clifford*, No. 82-357 (Jan. 11, 1984), slip op. 4 (plurality opinion); *Cady v. Dombrowski*, 413 U.S. 433, 439 (1973); Amsterdam, *Perspectives on the Fourth Amendment*, 58 Minn.L. Rev. 349, 410-11 (1974).

[5]*Segura v. United States*, No. 82-5298 (July 5, 1984), slip op. 7-8 (Stevens, J., joined by Brennan, Marshall & Blackmun J.J., dissenting); *New York v. Belton*, 453 U.S. at 457 (majority opinion), 464 (Brennan, J., joined by Marshall, J., dissenting); *Mincey v. Arizona*, 437 U.S. at 393, 405 (unanimous opinion); *Chambers v. Maroney*, 399 U.S. at 61-62 (Harlan, J., concurring in part and dissenting in part); *Terry v. Ohio*, 392 U.S. 1, 19 (1967); *United States v. Rabinowitz*, 339 U.S. at 70-71 (Frankfurter, J., dissenting); *see Texas v. Brown*, No. 81-419, slip op. 2 (Powell, J., joined by Blackmun, J., concurring in the judgment).

repeatedly rejected attempts by prosecutors to justify searches under these exceptions when the search, which would have been initially permissible without a warrant, has been delayed for sufficient time to make obtaining a warrant practicable. *See e.g., Michigan v. Clifford,* No. 82-357 (Jan. 11, 1984); *Michigan v. Tyler,* 436 U.S. 499 (1978); *G.M. Leasing Corp. v. United States,* 429 U.S. 338 (1977); *United States v. Chadwick,* 433 U.S. 1 (1977); *cf. Mincey v. Arizona,* 437 U.S. at 393-94; *Chimel v. California,* 395 U.S. 752, 762-63 (1969).

For example, this Court has permitted arresting officers to search any item, including a package, that is in the immediate control of an arrestee. An immediate warrantless search is permissible because there is always some danger that the person arrested may seize and destroy evidence from an area in his immediate control or because he might gain possession of a weapon that could be used against the arresting officers. *Chimel v. California,* 395 U.S. at 763. In *Chadwick,* this Court held that the search incident to arrest exception did not apply to the search of a footlocker that had been taken from the area within the immediate control of the arrestee but not searched until after a delay of one hour when it was secured at a government warehouse. The exception did not apply because once the footlocker was in the exclusive possession of the police, there was no longer any danger that the arrestee might gain access to it to seize a weapon or destroy evidence. It was once again practicable to get a warrant. *United States v. Chadwick,* 433 U.S. at 15; *see also Preston v. United States,* 376 U.S. 364, 368 (1964).

Similarly, in *Michigan v. Tyler,* this Court held that investigators may make an immediate warrantless entry

into a building after a fire has been extinguished to determine its cause and to ensure that it does not reignite. If they want to enter the building days after the fire has been extinguished, however, they must obtain a warrant. 436 U.S. at 511. *Accord G.M. Leasing Corp. v. United States,* 429 U.S. at 361 (Burger, C.J., concurring) (an exigency which would have permitted an immediate warrantless search of a building did not support a warrantless search two days later when it would have been practicable to obtain a warrant).

The principles applied to automobiles.

The Fourth Amendment rule, that a warrant is virtually always required before a person's reasonable expectation of privacy can be invaded by a search, does not apply to automobiles. If police officers have probable cause, they can execute a warrantless search of an automobile where it is found on the street or, if they choose, long afterwards, when it has been impounded at the police station. *Florida v. Meyers,* No. 83-1279 (Apr. 23, 1984), slip op. 3; *Chambers v. Maroney,* 399 U.S. at 51-52. Moreover, if the object of the search might be secreted within the upholstery of an automobile, the police do not need a warrant to rip apart that upholstery to find the evidence or contraband. *Carroll v. United States,* 267 U.S. 132, 153 (1925); *see United States v. Ross,* 456 U.S. at 804-05 & 818.

The reason that society is not prepared to recognize any subjective expectation that automobiles will be free from warrantless searches is that the very same Congress that ratified the Fourth Amendment also enacted a statute

that permitted the warrantless searches of ships, but not the warrantless searches of homes. *Id.* at 805-06. Since the same persons who enacted the Fourth Amendment did not believe that it prevented the warrantless probable cause searches of the predecessors of automobiles, a majority of this Court has reasoned that the Fourth Amendment did not create a guarantee that automobiles can only be searched with the protection of a warrant. *Id.*[6]

Unlike those exceptions which permit a search where a warrant would normally be required, the automobile exception is not limited by the practicability of obtaining a warrant. *See Michigan v. Thomas,* 458 U.S. 259, 261-62 & n.2 (1982); *Texas v. White,* 423 U.S. 67, 68 (1975). *Compare Michigan v. Tyler,* 436 U.S. at 511; *G.M. Leasing Corp. v. United States,* 429 U.S. at 361; *United States v. Chadwick,* 433 U.S. at 15; *Mincey v. Arizona,* 437 U.S. at 393-94. Since a warrant is virtually never required to search an automobile, the practicability of obtaining a warrant before searching an automobile is not relevant.

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[6]In addition to this historical reason, various other reasons have been advanced to justify warrantless automobile searches. Among those are that automobiles are subject to heavy regulation and inspection and that an automobile's main function is transportation, not the repository of personal effects. *See South Dakota v. Opperman,* 428 U.S. 364, 367-68 (1976); *Cardwell v. Lewis,* 417 U.S. 583, 590 (1974); *Cady v. Dombrowski,* 413 U.S. 433, 441-42 (1973). Additionally, on some occasions, the Court has noted that an exigency is created because the mobility of an automobile would allow it to leave the jurisdiction before a warrant could be obtained. *Coolidge v. New Hampshire,* 403 U.S. 443, 459-60 (1971); *Carroll v. United States,* 267 U.S. at 153. Since those cases, however, a majority of this Court has held that an automobile can be searched without a warrant, apart from any exigency that may be created by its mobility. *See Michigan v. Thomas,* 458 U.S. at 261-62 n.2; *Texas v. White,* 423 U.S. at 68.

The principles applied to packages.

In *United States v. Chadwick,* the government attempted to use the same arguments that had persuaded this Court to allow the warrantless search of automobiles to allow the warrantless search of packages. 433 U.S. at 7. With respect to packages, however, the argument did not have the same impressive historical pedigree. One hundred years earlier, this Court had decided *Ex parte Jackson,* 96 U.S. 727 (1878), wherein it was stated that the Warrant Clause applied to packages. *Id.* at 733. The *Chadwick* court followed *Jackson* and held that packages enjoy the full protection of the Warrant Clause. 433 U.S. at 10-11. Since *Chadwick* was decided, this Court has repeatedly stated that the presumption of the Fourth Amendment that all searches be conducted pursuant to a warrant is applicable to packages. *See e.g. United States v. Jacobsen,* No. 82-1167 (Apr. 2, 1984), slip op. 4; *United States v. Place,* No. 81-1617 (June 20, 1983), slip op. 5 & n.3; *Walter v. United States,* 447 U.S. 649 (1980); *United States v. Ross,* 456 U.S. at 812. Moreover, this Court has refused to draw a distinction between worthy and unworthy containers. *United States v. Ross,* 456 U.S. at 822. Instead, this Court has held that all containers, unless their outward appearance announces their contents, manifest a subjective expectation of privacy that society is prepared to recognize and accord the protection of the Warrant Clause. *Id.* at 811-12, 822.

While this Court touched upon the apparent tension that exists between the principles that allow a warrantless search of automobiles and those which do not permit the warrantless search of packages, in *United States v. Chadwick,* 443 U.S. 1 (1977) and *Arkansas v. Sanders,*

442 U.S. 753 (1979), that conflict was not addressed until the Court decided *Robbins v. California,* 453 U.S. 420 (1981). A plurality in *Robbins* held that packages found inside an automobile which was subject to a probable cause search could not be opened and searched without a warrant. *Id.* at 428. Justice Powell concurred, but noted that the dissenters had a strong argument that the right of the police to conduct a warrantless search of the automobile created an exigency as to the packages that would also allow them to search the packages without a warrant. *Id.* at 435 (Powell, J., concurring in the judgment). Justice Powell, however, did not believe that the posture of the *Robbins* case permitted that argument to be addressed, and he therefore concurred in the plurality's judgment. *United States v. Ross,* 456 U.S. at 815-17.

In *United States v. Ross,* the argument was addressed. The *Ross* majority quoted with approval that portion of Justice Powell's opinion suggesting that the automobile exception created an exigency as to the packages. *Id.* at 816. Overruling *Robbins,* the Court went on to hold that if the police have probable cause to believe that contraband or evidence is secreted in some unidentified portion of an automobile, they may search every part of the automobile, without a warrant, including any container found therein that might conceal the object of the search. *Id.* at 824-25.

This Court advanced two reasons to justfy this exception to the normal rule that packages cannot be searched without a warrant. First, the Court reasoned that there is a need for a bright line rule which will clearly tell the police and the lower courts when a warrantless search is

permissible and when it is not. *Id.* at 803-04, 825 (Blackmun, J., concurring), 826 (Powell, J., concurring). Second, the Court noted that the practical considerations involved in an automobile seach would be defeated if packages found inside the automobile could not be searched without a warrant. If a package could not be searched without a warrant, the warrantless search of the automobile would be delayed until a warrant for the package was obtained since, until the package was opened, the police could never be certain that the object of their search was not secreted in a yet-undiscovered portion of the vehicle. That result would be directly inconsistent with the *Carroll* rationale. *United States v. Ross,* 456 U.S. at 820 & 822, n.28. In satisfaction of these practical considerations, the *Ross* Court held that the scope of the search is no broader or narrower than what a magistrate could legimately authorize by a warrant. *Id.* at 825.

Therefore, while the *Ross* Court recognized that packages normally cannot be searched without a warrant, it held that the objective circumstances of an automobile search create an exigency that justifies an exception to that rule. This exception to the Warrant Clause, like its other exceptions, should be "strictly limited by the exigencies which justify its initiation." *Mincey v. Arizona,* 437 U.S. at 393, *quoting Terry v. Ohio,* 392 U.S. at 25-26. *See Michigan v. Clifford,* No. 82-357, slip op. 6-7; *Michigan v. Tyler,* 436 U.S. at 511; *G.M. Leasing Corp. v. United States,* 429 U.S. at 361 (Burger, C.J., concurring); *United States v. Chadwick,* 433 U.S. at 15; *Chimel v. California,* 395 U.S. at 762-63; *Preston v. United States,* 376 U.S. at 367.

The principles applied to this search.

The packages searched in this case were found in trucks near Bowie, Arizona. The packages were not opened or searched until three days later, after the packages had been removed from the trucks and secured at the D.E.A. warehouse in Tucson.

In attempting to justify this search, the Petitioner begins by explaining that packages found in an automobile may be searched without a warrant as part of an automobile search. Pet.Br. 15-16. The Petitioner thereafter almost exclusively relies on the various cases which hold that warrantless automobile searches may be conducted immediately on the scene where the automobile is found, or days later, after it has been secured at the police station. *Id.* at 16-27. None of these cases involve the warrantless search of packages at a government warehouse days after the packages had been removed from an automobile.

There is a strong presumption in favor of search warrants. The few exceptions to this rule are no broader than the reasons that gave rise to them. When an exception permits a search which would normally require a warrant (like the search of a package), the exception is limited by the practicability of obtaining a warrant. Once it becomes practicable to obtain a warrant, one must be obtained before a search will be permitted. *See e.g., Michigan v. Tyler,* 436 U.S. at 511; *G.M. Leasing Corp. v. United States,* 429 U.S. at 361 (Burger, C.J., concurring); *United States v. Chadwick,* 433 U.S. at 15-16; *Mincey v. Arizona,* 437 U.S. at 393-94.

Two reasons support the exception that allows the warrantless search of packages found in an automobile subject to a warrantless search. First, forcing the police to obtain a warrant to search the packages would unnecessarily delay and impede the automobile search, thus undercutting the judgment of the drafters of the Fourth Amendment that vehicles can be searched without a warrant. Second, the police and the lower courts need a bright line dividing when warrantless searches are allowed and when they are not. *United States v. Ross,* 456 U.S. at 803-04, 820-22.

Neither reason supports the search of these packages. First, the search was delayed for three business days. Pet.App. 2a. The agents had ample opportunity to obtain a warrant during those three days. If the agents had obtained a warrant during that period, the search of the trucks themselves would not have been further delayed or impeded. The rationale supporting *Carroll* would not have been undermined. Indeed, it appears that by the time the packages were searched, any search of the trucks had long since been completed. Undoubtedly, this is because the focus of the investigation, right from the beginning, was on the packages, not on the trucks. The first reason for the exception does not offer any support whatsoever for this search.

Second, police and the lower courts need rules of easy application as to when warrants are required. The Petitioner argues that any such bright line rule should allow the search that occurred here. Pet.Br. 23-25, 27 & n.13. But, in formulating any rule that allows a warrantless search where a warrant would normally be required, the first principle of Fourth Amendment jurisprudence, that

there is a heavy presumption in favor of warrants,[7] should be remembered. Any bright line rule should not stray far from this principle. *See Chimel v. California*, 395 U.S. at 765-66; *United States v. Rabinowitz*, 339 U.S. 56, 79-81 (1950) (Frankfurter, J., dissenting). *See also* Stewart, *The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search and Seizure Cases*, 83 Colum.L.Rev., 1365, 1397 (1983).

Surely, fire investigators need a bright line that will tell them when they can enter a building to determine the cause of a recently extinguished fire. This Court has allowed such an entry immediately after the fire has been extinguished and even a few hours later, if conditions make an immediate investigation impossible. But a warrantless entry a few days later is not permitted. *Michigan v. Tyler*, 436 U.S. at 511. In accordance with the Fourth Amendment presumption in favor of warrants, the bright line was drawn where it became practicable to get a warrant. *Accord United States v. Chadwick*, 433 U.S. at 15-16. Thus, while other pressing law enforcement duties may have permitted a delay of the search of these packages for a few hours, the bright line should be drawn where it became practicable to obtain a warrant.[8] The Petitioner, however, complains that a line

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[7]*New York v. Belton*, 453 U.S. at 457; *see Ross v. United States*, 456 U.S. at 824-25; *Mincey v. Arizona*, 437 U.S. at 393, 405 (unanimous opinion).

[8]This would be consistent with *United States v. Leon*, No. 82-1771 (July 5, 1984). After *Leon*, police officers will be encouraged to always obtain the warrant, as that will insulate them from both civil liability and the Exclusionary Rule. Affirming the Court of Appeals will even further encourage the police to obtain a warrant whenever practicable.

which closely adheres to the Fourth Amendment presumption in favor of warrants will unduly inconvenience law enforcement officials in the completion of their duties. Pet.Br. 25. But the inconvenience to law enforcement officials is never a sufficient reason to dispense with the warrant requirement. *Mincey v. Arizona*, 437 U.S. at 393.

As the Court of Appeals recognized, Pet.App. 11a-12a, the reasons that underlie the *Ross* exception do not support this search. To apply the exception would be contrary to the long line of cases which have refused to expand exceptions to the warrant clause beyond the reasons that gave rise to the exceptions.[9] Given that the reasons for the exception do not apply, Chief Justice Burger's statements for the Court in *United States v. Chadwick* are equally applicable here:

> "Even though on this record the issuance of a warrant by a judicial officer was reasonably predictable, a line must be drawn. In our view, when no exigency is shown to support the need for an immediate search, the Warrant Clause places the line at the point where the [packages] to be searched come[ ] under the exclusive dominion of police authority. Respondents were therefore entitled to the protection of the Warrant Clause with the evaluation of a neutral magistrate, before their privacy interests in the contents of the [packages] were invaded." 433 U.S. at 15-16.

Nonetheless, the Petitioner argues that this case should be governed by the cases which permit a delayed warrantless search of an automobile, Pet.Br. 16. Since the time

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[9]*Michigan v. Clifford*, No. 82-357, slip op. 9; *Michigan v. Tyler*, 436 U.S. at 511; *Mincey v. Arizona*, 437 U.S. at 393-94; *United States v. Chadwick*, 433 U.S. at 15-16; *G.M. Leasing Corp. v. United States*, 429 U.S. at 361 (Burger, C.J., concurring); *Chimel v. California*, 395 U.S. at 762-63.

the Fourth Amendment was enacted, automobiles (or their predecessors) have not been protected by the Warrant Clause.[10] In delineating the scope of the automobile exception, therefore, the practicability of obtaining a warrant is not relevant. The same is not true of packages. Packages normally are protected by the Warrant Clause. Therefore, like other areas that are protected by the clause, the scope of any exception that allows their search should be delineated by the practicability of obtaining a warrant.

The confusion of these principles by the Petitioner is illustrated by its discussion of *Chambers v. Maroney*. *See* Pet.Br. 16. The Petitioner quotes that portion of the *Chambers* opinion where this Court stated that if there is probable cause to search an automobile on the road, "that probable cause factor still obtain[s] at the station house." *Chambers v. Maroney*, 399 U.S. at 52. The Petitioner ignores the next sentence of the *Chambers* opinion where the Court states: "there is little to choose in terms of practical consequences between an immediate search without a warrant and the car's impoundment until a warrant is obtained". *Id.* While this may be true of automobiles, it is clearly not true of packages. This Court has repeatedly stated that there is an important difference between impounding a package in anticipation of obtaining a warrant and the warrantless search of a package. *United States v. Place*, No. 81-1617 (June 20, 1983), slip op. 4-5; *Texas v. Brown*, No. 81-419 (Apr. 19, 1983), slip op. 2 (Stevens, J., concurring in the judgment); *Walter*

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[10]*United States v. Ross*, 456 U.S. at 805-06. *But see Coolidge v. New Hampshire*, 403 U.S. 443, 458-64 (1971).

v. United States, 447 U.S. at 654. The Warrant Clause permits the former, but prohibits the latter. *Id.* Therefore, the opening of these packages implicated Fourth Amendment rights that were not touched upon by their mere seizure.

The Petitioner also argues that since the packages could have been searched at the time they were seized, the Respondents had no legitimate expectation of privacy that they would not be searched a few days later. Pet.Br. 23-24. A legitimate expectation of privacy has two components. The District Court found that the Respondents had manifested a subjective expectation of privacy in the packages. See Pet.App. 26a, *see also* 11/10/81 Tr. 40-41. If the packages had been found during the course of a lawful search of the trucks, a warrantless search could have been conducted of them as part of the truck searches. The objective circumstances of the on-going truck searches would have made it unreasonable to fully recognize the Respondents' subjective expectation of privacy. Once the packages had been secured at the D.E.A. warehouse, the objective circumstances had changed. There was no on-going search of the trucks. It was again practicable to obtain a warrant. The Respondents' subjective expectations of privacy should have been fully recognized even though, at some previous time, the packages may have been subject to a warrantless search. *See Michigan v. Tyler*, 436 U.S. at 511; *United States v. Chadwick*, 433 U.S. at 15-16; *G.M. Leasing Corp. v. United States*, 429 U.S. at 361 (Burger, C.J., concurring).[11]

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[11]The Petitioner makes a similar argument in Argument C of its Brief. There, Petitioner argues that since the packages

(Continued on next page)

III.

The Other Reasons Advanced By The Petitioner Do Not Justify Reversing The Court of Appeals.[12]

1) The Court's ruling in Ross that the scope of a warrantless automobile search is as broad as a search that could be authorized by a magistrate should not affect the outcome of this case.

In *Ross*, this Court held that the warrantless search of an automobile could be "as thorough as a magistrate could authorize in a warrant." 456 U.S. at 800. From this holding, the Petitioner argues that the search of the packages was clearly permissible. Pet.Br. 28-30. But, as explained above, the Respondents do not complain of the thoroughness of the search. If the agents were allowed to search the trucks, they were also allowed to contemporaneously search the packages. *United States v. Ross*, 456

(Continued from previous page)

could have been opened at the airstrip near Bowie, the Respondents had a reduced expectation of privacy that would allow the packages to be opened three days later. Pet.Br. 36-37. An expectation of privacy has two components. First, the defendant must have an actual subjective expectation of privacy. Second, that expectation must be objectively reasonable under the circumstances. While the objective component of the expectation of privacy may have been sufficiently diminished when the packages were at the airfield to allow a warrantless search, that does not mean that objective circumstances do not change. Later, when the packages had been secured, unopened, for three days at the D.E.A. warehouse in Tucson, the objective circumstances had changed. It was practicable to get a warrant. The Respondents' reasonable expectation of privacy was complete.

[12]Some of the arguments made in this section of the Petitioner's Brief are very similar to arguments made in other portions of the brief. Answers to those arguments were made above and will not be repeated here.

U.S. at 824-25. Rather, the Respondents' complaint is that the packages were secured for three days in the D.E.A. warehouse before they were opened without a warrant. When this Court said that a warrantless search could be as thorough as a search authorized by a warrant, it was speaking about the instrusiveness of the search, not the length of time that packages could be held without conducting any search whatsoever.

Nevertheless, if the issue were presented, it is doubtful that any magistrate would authorize the seizure of these packages for three days, without their being opened, absent some substantial justification. *See Segura v. United States*, No. 82-5298 (July 5, 1984), slip op. 7-9 (Stevens, J., dissenting). In *Segura*, it was recognized that the police may, under certain circumstances, seize an item in anticipation of obtaining a search warrant. *Id.* at 10-14 (Burger, C.J., joined by O'Connor, J.). The purpose of the seizure, however, is to give the police the opportunity to obtain a warrant. *Id.* Any seizure that is longer than what is longer than what is reasonably necessary to obtain a warrant would be unreasonable. *Id.* at 8-10 (Stevens, J., dissenting). *United States v. Place*, No. 81-1617 (June 20, 1983) is illustrative. There, on reasonable suspicion, the police were permitted to seize a suitcase so that a trained dog could sniff it to determine if it contained contraband. This Court, however, held that the 90-minute detention of the suitcase (which incidentally caused the detention of its owner) was unreasonable, because that was longer than what was necessary to have a dog smell the suitcase. *Id.* at 12-13. *See Segura* at 8 (Stevens, J., dissenting). If the 90-minute detention in *Place* was too long, undoubtedly a magistrate would not have authorized a three day delay in this case.

The government's citation of Fed.R.Crim.P. 41(c)(1), Pet.Br. 30, does not help the government's position. That rule gives the magistrate authority to issue a warrant that authorizes a search "within a specified time period *not to exceed ten days*" (emphasis added). The rule does not mean that all searches may take place within ten days after a warrant is issued. It only states the maximum allowable time period that a magistrate can authorize. In compliance with the reasonableness requirement of the Fourth Amendment, a magistrate might prescribe a shorter period of time. A magistrate would be especially likely to do so if the police had already seized the item to be searched. *Cf. United States v. Place, supra.* The amount of time that would be reasonable under the circumstances is a judgment that should be made by a magistrate, rather than police officers.[13] *See Mincey v. Arizona,* 437 U.S. at 395.

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[13]The Petitioner admits that the delay of a search of seized property may sometimes interfere with a person's possessory (as distinguished from privacy) interest in the property. Pet.Br. 24 n.13. The Petitioner argues, however, that the Respondents cannot make that claim here because there was probable cause to seize the packages and because the Respondents never asserted a possessory interest in the packages. *Id.* Contrary to the government's argument, a seizure of property, in anticipation of a search, even based on probable cause, may become unreasonable if the search of the property is unnecessarily delayed. *See Segura v. United States,* No. 82-5298, slip op. 8-10 (Stevens, J., dissenting). Moreover, the seizure of a package will often be the basis for its owner's arrest. If contents of the package turn out to be innocent, the owner will usually be released and the package returned to him. Therefore, an unreasonable delay in searching a package may cause an unreasonably lengthy detention of its owner. *Cf. United States v. Place,* No. 81-1617, slip op. 12-13 (the ninety minute detention of an airport passenger's suitcase was unreasonable in part because it forced the passenger to stay at the airport with his suitcase). Finally, the Petitioner's assertion that the Respondents never asserted a possessory interest in the packages is contrary to the record. 11/10/81 Tr. 37, 41-43, 45-47.

2) The fact that this argument is presented for the first time in this case is no basis for rejecting it.

The Petitioner argues that the fact that this issue has not been litigated before illuminates the legal profession's understanding that this search was permissible without a warrant (citing *United States v. Ross,* 456 U.S. at 819). Pet.Br. 31, n.16. In support of the "profession's understanding", the Petitioner relies on two cases[14] where the facts presented this issue, but it was not litigated, and on the fact that the Respondent did not raise this issue below. *Id.* When the motion to suppress was litigated below, *Ross* had not yet been decided. In granting the motion to suppress, the District Court relied on *Robbins v. California,* 453 U.S. 420 (1981). Pet.App. 23a. When the parties filed their briefs in the Court of Appeals, *Ross* still had not been decided, and both sides argued the applicability of *Robbins.* Appellant's Br. 9; Appellee's Br. 23-32. Finally, when *Ross* was decided, the Respondents filed a motion with the Court of Appeals to file an additional brief.[15] That motion was denied.

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[14]*United States v. Rivera,* 654 F.2d 1048, *on reh'g.* 684 F.2d 308 (5th Cir. 1982); *Sharpe v. United States,* 712 F.2d 65 (4th Cir. 1983), *cert. granted on other issues,* No. 83-529 (June 18, 1984). The other cases cited by the government did not involve package searches.

[15]While the Respondents did not specifically request permission to address the issue raised by the delay, they did request permission to file an additional brief because the exact boundaries of distinction drawn by *Ross* were not yet known. Opposition to Motion to Submit Briefs/Motion to File Additional Briefs (filed July 30, 1982) 16-17.

The issue raised in this case springs from the different interpretations of *Ross*. *See* Pet.App. 11a-13a; Pet. 21. Prior to *Ross*, most litigants were probably satisfied to rely on *Robbins* and the dicta in *Arkansas v. Sanders*, 442 U.S. at 763-65 that was rejected by *Ross*. 456 U.S. at 824. It should not be surprising, therefore, that the Respondents and other litigants did not raise this issue before *Ross* was decided. This Court in *Ross* relied on fifty years of Fourth Amendment litigation to "illuminate[ ] the profession's understanding". 456 U.S. at 818-19. The Petitioner's citation of two cases decided in the two year period following *Ross* and its truncated history of the litigation in this case are not comparable. In short, there simply has not been sufficient development of the *Ross* doctrine to illuminate the profession's understanding one way or another.

3) The fact that in most automobile searches the police will remove packages from the automobiles before opening them does not justify this search.

The Petitioner notes that in most automobile searches, packages and other containers will be removed from the automobile before they are searched. From this, the Petitioner argues that to the extent the Court of Appeals decision is based on the mere separation of the packages from the trucks before the search, it is untenable. Pet. Br. 33. But, the Respondents' argument is not based on the mere separation of the packages from the trucks. The police may decide for themselves the order of the search and its mechanics. *Cf. Michigan v. Tyler*, 436 U.S. at 510-11 (officials investigating the cause of a fire may leave the building for a short while if conditions make investigation unduly difficult). Rather, both the Court of Appeals

(Pet.App. 9a-13a) and the Respondents interpreted *Ross* in accordance with the well-established principle that exceptions to the Warrant Clause should be no broader than the reasons that justify the exceptions. The reasons that justify the *Ross* exception to the rule that packages can only be searched under the authority of a warrant do not obtain when the packages have been removed from the automobiles and stored in a government warehouse for several days before they are searched. The fact of the packages' removal, by itself, is not significant.

4) The Respondents did not have a diminished expectation of privacy in their packages that would justify this search.

The Petitioner argues that the warrantless search of the packages was justifiable because the Respondents had a diminished expectation of privacy in their packages. Pet.Br. 36-41. In support of this argument, the Petitioner states that since the officers "were justifiably confident that they already knew precisely what they had found", it was reasonable to open the packages without a warrant. Pet.Br. 37-38. The Petitioner appears to be relitigating their claim that these packages could not support any reasonable expectation of privacy because by their very nature they announced their contents. *Arkansas v. Sanders*, 442 U.S. at 764-65, n.13. The District Court, after hearing all the evidence, rejected this argument, finding that "neither the shape nor any other characteristic of the seized containers made their contents readily ascertainable." Pet.App. 28a. This finding was affirmed by the Court of Appeals. Pet.App. 4a-5a. The Petitioner did

not seek review on this issue. Pet. 20. The issue should not be litigated again.[16]

The Petitioner appears to acknowledge this, but nevertheless argues that this warrantless search should be permitted because it was reasonable. Pet.Br. 37-38. In support of this argument, the government relies on the portion of *Cooper v. California,* 386 U.S. 58, 62 (1967), which quotes *United States v. Rabinowitz,* 339 U.S. 56 (1950). The quoted portion of the *Rabinowitz* opinion states the issue is not whether a warrant could have been obtained, but only whether the search was reasonable. *Id.* at 66. That very portion of *Rabinowitz* was overruled by this Court in *Chimel v. California,* 395 U.S. 752, 760 & 768 (1969), which was decided after *Cooper.* In *Chimel,* this Court reasoned that it is not enough to require that warrantless searches be reasonable. There must be some criteria by which to judge their reasonableness. *Id.* at 765. At least where an exception permits a search for criminal evidence that would normally require a warrant, that criteria is supplied by the Warrant Clause. *See South Dakota v. Opperman,* 428 U.S. 364, 381 (1976) (Powell, J., concurring); *United States v. United States Dist. Ct.,* 407 U.S. at 315-16 & n.16. Such a warrantless search is reasonable only if there is a good reason for not obtaining a warrant. *United States v. Rabinowitz,* 339 U.S. at

[16]The district court's finding that the packages manifested a reasonable expectation of privacy was at least in part based on its rejection, on credibility grounds, of the testimony of one of the Customs agents. Pet.App. 20a-22a n.2. The uncertain credibility of the testimony offered by the government below should also preclude the relitigation of this factual issue.

83-84 (Frankfurter, J., dissenting). *See Chimel v. California,* 394 U.S. at 762-65.[17]

The Petitioner also argues that the diminished expectation of privacy which surrounds automobiles should inure to these packages. Pet.Br. 41. But "the word automobile is not a talisman in whose presence the Fourth Amendment fades away and disappears". *Arkansas v. Sanders,* 442 U.S. at 761 n.7, *quoting Coolidge v. New Hampshire,* 403 U.S. 443, 461-62 (1971). While it is true that there is a lesser expectation of privacy in automobiles, the same is not true of packages. *United States v. Ross,* 456 U.S. at 811-12; *United States v. Chadwick,* 433 U.S. at 11. Unlike automobiles, packages manifest a full reasonable expectation of privacy. *Id.* The fact that at some earlier time these packages were momentarily in trucks should not mean that they are forever tainted by the diminished expectation of privacy that surrounds the

[17]A different rule may sometimes apply if the search is not for evidence of a crime or does not normally require a warrant. *See e.g., Illinois v. Lafayette,* No. 81-1859 (June 20, 1983) (inventory search and search of an arrestee); *United States v. Edwards,* 415 U.S. 800 (1974) (search of an arrestee); *Chambers v. Maroney,* 399 U.S. 42 (1970) (automobile search); *see South Dakota v. Opperman,* 428 U.S. at 381-84 (Powell, J., concurring); *but see also Marshall v. Barlow's Inc.,* 436 U.S. 307 (1978) (administrative warrant needed for OSHA inspection). Any rule of "reasonableness", however, unconfined by the Warrant Clause, which would allow warrantless searches for evidence of a crime of areas normally protected by the warrant requirement, would rapidly lead to the evaporation of the protections the clause was designed to protect. *Chimel v. California,* 395 U.S. at 764-65; *see United States v. United States Dist.Ct.,* 407 U.S. at 316-18; *Katz v. United States,* 389 U.S. at 356-57; Stewart, *The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases,* 83 Colum.L.Rev. at 1397.

automobile. Rather, as explained above, a person's reasonable expectation of privacy in a package should be fully recognized unless some objective circumstance, such as an ongoing automobile search, makes it reasonable to invade that privacy without a warrant.[18]

Finally, the Petitioner criticizes the Court of Appeals' analogy to searches incident to arrest. Pet.Br. 42-43. Whatever an arrestee's subjective expectation of privacy

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[18]The Petitioner also argues that this case should be reversed because the core sampling technique involved only a *de minimis* invasion of privacy and that the contents of the packages, if not marijuana, was some agricultural commodity of low privacy value. Pet.Br. 38 n.19. There is absolutely no basis in the record to support the Petitioner's argument. At the beginning of the motion to suppress, the parties stipulated that core samples were removed from the packages. 11/9/81 Tr. 5. There is no evidence on how large the core samples were or on the process by which they were taken. Nor is there any evidence on whether the testing technique employed by the government would have revealed the identity of the substance if it were not marijuana. *See United States v. Jacobsen,* slip op. 12-14. In short, there is no basis to compare this search with the testing of the white powder in *Jacobsen*. Additionally, to the extent that the Petitioner's argument is based on the allegedly low-privacy value of agricultural commodities, it is falacious. As Justice Stewart pointed out in *Robbins v. California:* The Fourth "Amendment protects people and their effects, and it protects those effects whether they are 'personal' or 'impersonal'. . . . Once placed in . . . a container, a diary and a dishpan are equally protected by the Fourth Amendment." 453 U.S. at 426. (Citations omitted). That portion of the *Robbins* opinion was left undisturbed by *Ross*. *See* 456 U.S. at 822 & n.29. Moreover, these packages were described by the District Court as cardboard boxes or double, opaque, green bags that were sealed with a thick tape. Pet.App. 26a. Other than the testimony that there was the odor of marijuana in and around the area where the trucks were found, 11/9/81 Tr. 127-28, 215, there was no evidence whatsoever which would support a finding that the packages, from their appearance, weight or feel revealed that their contents was some sort of agricultural product.

might be, it has long since been recognized that his person can be searched without a warrant. *Weeks v. United States,* 232 U.S. 383, 392 (1914); *Agnello v. United States,* 269 U.S. 20, 30 (1925). Like automobiles, an arrestee's person may be searched immediately upon arrest, or many hours later, when the arrestee is incarcerated in a jail. *United States v. Edwards,* 415 U.S. 800, 808-09 (1969). Similarly, a package that is within the area under the arrestee's control when he is arrested may be searched without a warrant. *New York v. Belton,* 453 U.S. at 460 (1981). Regardless of any subjective expectation of privacy that the arrestee might have in the package, the objective circumstance of the arrest makes it permissible to search the package without a warrant. *Id.* That objective circumstance no longer obtains, however, if the police elect not to open and search the package on the scene, but instead transport it to the police station where it is secured. Once the package is safely secured at the police station, the police may not open it without first obtaining the approval of a magistrate. *United States v. Chadwick,* 433 U.S. at 15.

The analogy to the instant case is compelling. If the police had lawfully searched the trucks, they were also entitled to contemporaneously conduct a warrantless search of the packages found within the trucks. As in *Chadwick,* however, when the agents elected instead to transport the packages to Tucson and store the packages in the D.E.A. warehouse for three days, they could no longer search them without a warrant. The Petitioner's reliance on *United States v. Edwards* (*see* Pet.Br. 43 n.21) is misplaced. *Edwards* permitted the warrantless seizure

and search of an arrestee's clothing hours after he had been arrested and incarcerated at the local jail. 415 U.S. at 808-09. It did not purport to allow the search of a package that was in the control of the arrestee when he was arrested but not searched until it was secured at a government warehouse. As explained above, that situation, like this case, is governed by *Chadwick* and requires a search warrant.

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CONCLUSION

For all of the above reasons, it is respectfully urged that the decision of the Court of Appeals be affirmed.

Respectfully submitted,

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No. 83-1625

In the Supreme Court of the United States

OCTOBER TERM, 1984

UNITED STATES OF AMERICA, PETITIONER

v.

LYLE GERALD JOHNS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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REPLY BRIEF FOR THE UNITED STATES

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1. Respondents' primary contention (Br. 10-15) is that the judgment below should be affirmed on a ground unequivocally rejected by the court of appeals — namely, that "the focus of the investigation [here was] on the packages themselves and not on the entirety of the vehicle in which they [were] placed" (Br. 12) and therefore that this case is governed by *United States* v. *Chadwick*, 433 U.S. 1 (1977). The thrust of this argument is that the officers were not permitted to open the bales of marijuana without a warrant even at the time they were first discovered and seized; the delay on which the court of appeals focused is irrelevant to consideration of this contention. The court of appeals correctly found (Pet. App. 8a-9a), however, that this reliance upon *Chadwick* is completely belied by the facts.

As respondents recognize (Br. 10), under *United States* v. *Ross*, 456 U.S. 798 (1982), when police have probable cause to support a warrantless search of an automobile, they are also authorized to search without a warrant any containers or packages found inside that might be repositories of the objects sought. The Court in *Ross*, however, did not disturb the prior holdings in *Chadwick* and *Arkansas* v. *Sanders*, 442 U.S. 753 (1979), that a warrant is necessary to search a container when "the police [have] probable cause to seize the suitcase before it [is] placed in the [automobile] and [do] not have probable cause to search the [automobile] itself." 456 U.S. at 812-813 (footnote omitted). In *Chadwick*, agents had probable cause to believe that a footlocker on a train contained narcotics; as soon as the footlocker was placed in the trunk of a car, the agents seized it and later searched it without a warrant. In *Sanders*, police received reliable information that an airplane passenger would arrive carrying a green suitcase containing marijuana. After the passenger arrived at the airport, the suitcase was placed in the trunk of a taxi. The police followed, stopped the taxi after it had driven several blocks, and seized and searched the suitcase. "It is clear * * * that in neither *Chadwick* nor *Sanders* did the police have probable cause to search the vehicle or anything within it except the footlocker in the former case and the green suitcase in the latter." *Ross*, 456 U.S. at 814. This case bears no resemblance in this regard to *Chadwick* and *Sanders*, but rather is squarely controlled by *Ross*.

The investigatory efforts in the early morning hours before respondents' arrest show unmistakably that, while the Customs officers suspected illegal activity, they were not aware of its particulars nor was their attention focused on any particular containers. The investigation was centered on respondents, who were known to be involved in drug smuggling, and surveillance of their suspicious activity was

the primary focus. The suspicion that there was contraband in any specific location did not develop until the officers saw the trucks meet two small planes at the remote Bowie airstrip. Their observations there did not focus suspicion on any containers. In the words of the court below, "[t]he customs officers * * * remained some distance away while [respondents] placed the packages inside the trucks. The officers did not see the packages nor have a chance to seize the contraband until after loading." Pet. App. 8a. Thus, when the officers approached the vehicles on the basis of probable cause to believe they contained contraband, they had not even seen the packages yet and certainly did not have a suspicion focused on anything other than the vehicles. Even after they saw the bales that apparently contained marijuana, the court of appeals correctly found that the officers had "probable cause to search both vehicles, not just the newly-discovered bales. Their suspicion did not focus solely on the packages; it was not obvious that all the contraband would be in the bales. [Respondents] could have easily secreted other drugs elsewhere in the vehicles." *Id.* at 8a-9a.

Respondents' argument appears to be based on the assertion that "the police officers focused their attention exclusively on the packages from the moment they arrived on the scene" (Br. 13).[1] This contention, however, is quite beside

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[1]Respondents also argue (Br. 13-14) that the government's presentation of a "plain view" argument to the court of appeals demonstrates that the focus of the investigation was on the packages, not the automobile. This contention is puzzling. Under the plain view doctrine, officers may seize clearly visible contraband if they are in a place where they have a right to be. (The court of appeals rejected the government's contention that the *contents* of the bales were effectively in plain view, and hence that they could be opened, because the contents could be inferred from the outward appearance of the bales (Pet. App. 4a n.2)). Here, the officers' purpose in approaching the vehicles — at which time they saw the packages — was to search the vehicles on the basis of probable cause. That the officers' attention was attracted by the packages in the course of the search does not in any way suggest that their attention was focused on the packages when the search commenced.

the point. The officers approached the vehicles with probable cause to search them; as they approached, they smelled marijuana and observed the square packages wrapped in trash bags. Quite naturally, their attention "focused" on these newly-discovered packages, but that does not mean that their probable cause to search the rest of the vehicles evaporated. Cf. *Texas* v. *Brown*, 460 U.S. 730, 750 (1983) (Stevens, J., concurring) (observations that justify plain view seizure of container may also establish probable cause to search car and containers found therein).[2]

As this Court noted in *Ross* (456 U.S. at 820), contraband in a car is almost invariably stored in a container; therefore, when officers with probable cause to search a vehicle for contraband approach their task, they will always be expecting to search whatever containers are in the vehicle that could enclose contraband. This does not remove the situation from the purview of *Ross*. Indeed, in *Ross* itself the officers did not expect the heroin to be scattered about the vehicle, and there can be little doubt that the officers' attention focused on the paper bag the moment they opened the trunk of the car. Nevertheless, the officers were not required to procure a warrant in order to search the bag. It is true in

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[2]To bolster their contention that the officers' suspicions were focused on the packages, respondents note (Br. 13) that the record does not indicate that the trucks were searched after their removal from the airport. But there is similarly nothing in the record that indicates that the trucks were not searched; the record is simply silent on the matter, which is not surprising since it is of no particular significance. In any event, common sense suggests that officers who found a substantial quantity of contraband in a truck would be expected to complete a thorough search of the truck whether or not their suspicions were focused on the truck before the contraband was found. Since the trucks were seized and taken back to DEA headquarters (see Resp. Br. 3; 11/9/81 Tr. 129), there is every reason to assume that they were searched.

this case that no extensive search of the car was necessary before the packages were discovered[3] and, moreover, that the external appearance of the packages gave the officers particularly strong reason to believe that they contained contraband.[4] But these aspects of the case do not distinguish it in principle from *Ross*. This is still a case in which officers approached a vehicle in order to search it on the basis of probable cause to believe that the vehicle contained contraband, and on that basis searched without a warrant packages found in the vehicle. The case is not at all analogous to *Chadwick* and *Sanders*, where the officers had probable cause focused exclusively on a particular container before it was placed in a vehicle, and it was mere happenstance that the containers were in a vehicle at the time they were seized.[5]

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[3]Respondents argue (Br. 13) that the trucks were not searched at all before the packages were seen. But this is surely irrelevant given that the officers had probable cause to search the trucks. The situation here is analogous to the one that would have been presented in *Ross* if the paper bag had been visible in the interior of the car as the officers approached, rather than in the trunk; the officers in *Ross* undoubtedly would not have needed to get a warrant in such a case.

[4]Respondents seem to rely on this fact to support their contention that suspicion focused on the packages (see Br. 13). It is undoubtedly true that the officers were fairly certain that the packages contained contraband when they seized them. Indeed, that indirectly accounts for this case reaching this Court; the delay that is the focus of the question presented here (assuming that there was such a delay at all (see U.S. Br. 5 n.2)) is plainly attributable to the fact that the officers had no reason to open packages when they already "knew" — to a reasonable degree of certainty — what was inside. But surely the fact that police suspicion that a package contains contraband transcends probable cause and reaches a level of near certainty cannot be a reason for imposing a warrant requirement simply because that suspicion may have the understandable effect of diverting attention from the rest of the vehicle.

[5]The recent grant of review in *Oklahoma* v. *Castleberry*, cert. granted, No. 83-2126 (Nov. 5, 1984), suggests that the Court may be prepared to reconsider the holdings of *Chadwick* and *Sanders* and to expand the reach of the doctrine enunciated in *Ross*. But, as shown above, respondents' arguments here fail even if the current state of the law is left unchanged by *Castleberry*.

2. Respondents also contend (Br. 15-29) that even if *Ross* did authorize a warrantless search of the packages at the airport, the officers were required to obtain a warrant when they opened the packages three days later (see Br. 39). This contention is a narrow one. Respondents do not dispute that the automobile search doctrine generally permits police to conduct a warrantless search of an automobile at the police station long after it is first secured (see Br. 19, 24). They contend, however, that this rule does not apply to that portion of the automobile search that involves opening a package found in an automobile. According to respondents (Br. 26), the warrantless search of such a package authorized in *Ross* must be performed within at most "a few hours"; after that time a warrant is required to search the package (although not the rest of the automobile). This argument completely misunderstands the import of *Ross*.

In *Ross*, the Court held that the authority to conduct a warrantless search of an automobile based upon probable cause extended to the search of any part of the vehicle, including packages contained inside. Under *Ross*, the search of a package found in an automobile is simply a part of the automobile search itself. Thus, respondents' argument that, after a period of delay, a warrant is required to search a package but not the automobile itself is at odds with *Ross*.

Respondents seek to justify their contention by arguing that the "exigencies" (Br. 23) that permit a warrantless search of a package at the outset no longer justify such a search after a delay. It is true, of course, that there was no exigency here that prevented the officers from getting a warrant when they removed the core samples for testing. But the Court in *Ross* made clear in no uncertain terms that the validity of the warrantless search involved there — both of the automobile and of the package inside — did not depend on any particular exigency. The search there was

identified as an " 'exception' to the general rule that '[i]n cases where the securing of a warrant is reasonably practicable, it must be used' " (456 U.S. at 807, quoting *Carroll* v. *United States*, 267 U.S. 132, 156 (1925)). Accordingly, the Court recognized that police are permitted to search an automobile without a warrant when it has been secured at the station as well as when it is seized on the street; a contrary rule would impose a significant cost on the police without achieving any substantial protection of privacy interests (since it would usually simply lead to a search on the street). 456 U.S. at 807 n.9. In short, the fact that the police have probable cause to believe that a vehicle contains contraband provides a basis for searching it without a warrant even in the absence of any particular exigency (*ibid.*) —and *Ross* teaches that that search authority extends to the packages inside the vehicle.[6]

Respondents advance no good reason why automobile container searches should be subject to time limitations not applicable to the rest of the automobile search.[7] They

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[6]Respondents seriously miss the mark in attempting to analogize this case to searches incident to arrest or entries to determine the cause of a fire (see Br. 18-19). The searches in those cases are not exceptions to the warrant requirement in the sense that they permit warrantless searches based on probable cause; they are exceptions to the *probable cause* requirement that are permitted in certain special situations. When the reason justifying the search is gone, *i.e.*, when the potential danger to the arresting officers or from the fire has passed, there is no longer a basis for a search or entry. Here, however, the probable cause that forms the justification for the search still exists after the vehicle has been secured, and it is that probable cause that provides a basis for searching the vehicle or a container found inside. See *Ross*, 456 U.S. at 807 n.9.

[7]Respondents explicitly eschew reliance on the fact that the packages apparently were no longer in the trucks when they were opened (see Br. 34-35). As explained in our opening brief (at 31-35), such a contention would be untenable, since it is to be expected that in almost every case a container would be removed from an automobile before it is searched.

contend (Br. 25-26) that the interest in having a "bright line rule" to guide law enforcement officers argues in favor of their position here. This contention is difficult to understand. The government's suggested rule is simple and easy to apply; auto container searches should be treated the same as other automobile searches, in accordance with the rationale and apparent dictates of *Ross*. But respondents argue for anything but a bright line; they concede that containers in automobiles may be searched without a warrant when first seized or after a delay of "a few hours," but not after it becomes "practicable to obtain a warrant" (Br. 26).

Basically, respondents suggest that *Ross* has little, if any, independent significance apart from restating the rule that exigent circumstances can excuse the warrant requirement; that suggestion is contrary to the clear import of *Ross*. See especially 456 U.S. at 807 n.9. Indeed, the Court in *Ross* specifically noted that it was setting forth a general rule that "may appear unsatisfactory" in a particular case, such as one where a warrant feasibly could be obtained (*ibid.*).[8]

Finally, respondents fail to explain how their expectation of privacy in the bales of marijuana could possibly have increased after the bales were seized by the police (see Br. 29). Because the packages were present in a vehicle, respondents had a reduced expectation of privacy in them that allowed them to be searched on the basis of probable

[8]Respondents correctly note (Br. 25) that one practical reason given by the Court in *Ross* for its holding — that requiring a warrant for a container search would delay completion of the automobile search (see 456 U.S. at 821 n.28) — no longer obtains when the search is substantially delayed. But this practical consideration was tangential to the decision in *Ross*, which was based primarily on the rationale that the scope of the automobile search should extend as far as the probable cause that justifies it, just as if a search warrant had been issued by a magistrate.

cause without a warrant. Since the packages remained in unaltered condition between seizure and search, and since respondents did not even know how rapidly the packages would be searched, we cannot comprehend how the period of delay could have any bearing upon either respondents' objective or subjective expectations of privacy in their contents.[9]

For the foregoing reasons and the reasons stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

REX E. LEE
Solicitor General

NOVEMBER 1984

[9]Respondents' reliance (Br. 31-32) on *United States* v. *Place*, 462 U.S. 696 (1983), and the dissent in *Segura* v. *United States*, No. 82-5298 (July 5, 1984), is misplaced. Those opinions recognize that a lawful seizure at some point may become unreasonable because of its duration. That is because it represents an unreasonable interference with an individual's lawful *possessory* interest, not because of any invasion of privacy. Even if that principle were applicable here, three days is surely not an unreasonable length of time to hold plastic-wrapped packages reeking of marijuana on the basis of probable cause. Compare *United States* v. *Van Leeuwen*, 397 U.S. 249 (1970) (mail held 29 hours on basis of reasonable suspicion). (The 90-minute limit in *Place* is inapposite here because that seizure was predicated only on reasonable suspicion.) Moreover, the question of an unreasonably long dispossession does not even arise here because the police had no reason to believe that respondents had any lawful possessory interest in the seized bales. Unlike the suitcase in *Place* and the apartment in *Segura*, the seized bales appeared to be nothing more than forfeitable contraband, and respondents did not assert to the officers that they had any lawful interest in the bales and wanted them returned. They had no right, of course, to return of the contraband. The fact that they asserted an interest in the marijuana sufficient to confer "standing" (see Resp. Br. 32 n.13) does not give respondents any reason to complain that the length of the seizure unreasonably deprived them of their property.

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